REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: HC-MD-CIV-ACT-CON-2020/05121

In the matter between:

JACQUES DE WITT **PLAINTIFF**

and

OVERO INVESTMENTS CC **DEFENDANT**

Neutral citation: *De Witt v Overo Investments CC* (HC-MD-CIV-ACT-CON-2020/05121) [2022] NAHCMD 243 (13 May 2022)

Coram: SIBEYA, J
Heard: **22 April 2022**
Delivered: **13 May 2022**

Flynote: Interpretation of Contracts - words must be given their ordinary, grammatical meaning - Arbitration clauses do not oust the jurisdiction of this Court.

Summary: The plaintiff's claim against the defendant is based upon a written agreement between the parties, namely annexure A to the particulars of claim.

Clause 16 provides, *inter alia*, that if any disputes or differences arise between the Parties to the agreement then either party may request that such dispute be referred for arbitration.

The defendant raised a special plea wherein it seeks that the plaintiff's action be stayed, pending the final determination of the disputes through mediation and arbitration in terms of clause 16 of the agreement.

A dispute has now evolved surrounding the interpretation of clauses 16.1 and 16.11 of a written agreement entered into between the plaintiff and the defendant.

Interpretation is a unitary exercise in which both text and context are relevant to construing the contract. Interpretation is a matter for the court and not for the parties.

Held that – the word 'may' in clauses 16.1 and 16.11 is unambiguous and therefore has to be given its ordinary meaning, which confers a discretionary power upon the aggrieved party to either refer the dispute to arbitration or not.

Held that - for the plaintiff or the defendant to be obligated to refer this contractual dispute to arbitration before an arbitrator appointed from the ranks of the Namibia Council for Architects and Quantity Surveyors, such arbitrator will not be better placed, qualified or experienced to determine disputes of this nature, then the court.

Held that - there exist no grounds upon which this court's jurisdiction is ousted. As such the defendant's special plea is dismissed with costs.

ORDER

(a) The defendant's special plea of arbitration is dismissed with costs, which are capped in terms of rule 32(11).

(b) The matter is postponed to 9 June 2022 at 08:30 for a pre-trial conference hearing.

(c) Parties must file a duly signed revised joint pre-trial report and an additional copy thereof in word format on or before 3 June 2022.

JUDGMENT

SIBEYA, J

Introduction

[1] The plaintiff's claim against the defendant is based on a written agreement between the parties, namely annexure A to the particulars of claim titled: Agreement for Construction Site Management Services. Annexure A will be referred to as the agreement.

[2] As per the agreement, the plaintiff was appointed to render construction site management services to the defendant at the constriction site. The plaintiff claims that he rendered management site services to the defendant in terms of the agreement but the defendant on the other hand failed to remunerate the plaintiff in terms of the said agreement. The plaintiff further claims that the parties agreed that the defendant will provide the plaintiff with other benefits including accommodation and a site vehicle, which the plaintiff claims, was breached by the defendant. He, therefore, claims outstanding remuneration of N$117 475.60; accommodation N$9 324.99; and fuel and tool purchases N$2 450 and N$3 529.48 respectively.

[3] Clause 16 of the agreement contains, *inter alia*, the following express provisions:

> 16.1 Should any disputes or differences whatsoever arise between the Parties, relating to this Agreement, its construction, effect or as to the rights, duties and/or liabilities of the Parties and/or either of them under or by virtue of this Agreement or otherwise or as to

any other matter in any way arising out of the subject matter of this Agreement, then either Party hereto may:

(a) Declare a dispute by delivering the details thereof to the other Party; and

(b) Request that such dispute be referred by the Parties, without legal representation, to mediation by a single mediator at a place and time to be determined by the mediator…

16.11 If either Party is unwilling to accept the opinion expressed by the mediator then they may, by notice delivered to the other within thirty (30) calendar days of receipt of the mediator's opinion, require that the dispute be referred to arbitration.'

[4] It is beyond dispute that the plaintiff's claim herein constitutes a dispute or difference as envisaged in clause 16 of the agreement. Reference is made to the wide wording of clause 16 and in particular the words *"any disputes or differences whatsoever"* that may arise *"relating to this Agreement, its construction, effect or as to the rights, duties and/or liabilities of the Parties and/or either of them under or by virtue of this Agreement or otherwise or as to any other matter in any way arising out of the subject matter of this Agreement".*

[5] It is further common cause that the plaintiff has not declared a dispute, nor has the plaintiff referred the dispute to mediation and/or arbitration.

[6] As a result, the defendant raised a special plea where it seeks that the plaintiff's action be stayed, pending the final determination of the disputes through mediation and arbitration in terms of clause 16 of the agreement.

<u>Parties and representation</u>

[7] The plaintiff is Jacques De Witt, a major male who resides in Okahandja, Republic of Namibia.

[8] The defendant is Overo Investments CC, a close corporation duly registered as such in terms of the laws applicable in the Republic of Namibia, with its principal

place of business situated at No. 18 Herbst Street, Ludwigsdorf, Windhoek, Republic of Namibia.

[9] Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as 'the parties'.

[10] The plaintiff is represented by Mr Pretorius while the defendant is represented by Ms Van der Westhuizen.

Parties' arguments

[11] The plaintiff contends that the wording of clause 16 afforded the aggrieved party discretion whether or not to refer the dispute to arbitration.

[12] Mr Pretorious on behalf of the plaintiff, relied heavily on the use of the word 'may' in clauses 16.1 and 16.11 of the agreement and contends that this word allows an election to an aggrieved contracting party whether to have a dispute resolved by arbitration or the court of law.

[13] Ms Van der Westhuizen argued contrariwise on behalf of the defendant and submitted that if the plaintiff's interpretation of the word 'may' within the context of clause 16 is correct it would render the arbitration agreement meaningless. She argued further that the arbitration clause will be useless as it would be dependent upon the 'whims of either of the parties.' That could never have been the intention of the parties, she argued.

[14] Ms Van der Westhuizen relied on the case of *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*, where it was held in paragraph 24 that:[1]

> 'The approach adopted here requires a court engaged upon the construction of a contract to assess the meaning, grammar and syntax of the words used, as well as to construe those words within their immediate textual context, as well as against the broader purpose and character of the document itself. Reliance on the broader context will thus not only be resorted to when the meaning of the words viewed in a narrow manner appears

[1] 2015 (3) NR 733 (SC).

ambiguous. Consideration of the background and context will be an important part of all contractual interpretation.'

[15] She emphatically argued that the word 'may' in clauses 16.1 and 16.11 does not mean that a party may elect to resort to arbitration or to litigation in court as such an interpretation detracts from the business efficacy of the agreement and renders the arbitration clause meaningless and uncertain. Ms Van der Westhuizen further argued that 'may' in its ordinary meaning, and also considered within the context of the agreement and the relationship between the parties, simply means that any party to a dispute or difference, would be entitled to take steps to assert their rights in respect of the dispute or difference. But once a party to a dispute or difference elects to assert their rights, it must be by way of arbitration, so she argued.

[16] Ms Van der Westhuizen further referred to the matter of *Fiona Trust & Holding Corporation and Others v Privalov and Others*,[2] where Lord Hoffmann stated the following with regard to the interpretation of arbitration clauses:

'Arbitration is consensual. It depends on the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language'.

[17] Ms Van der Westhuizen submitted further that the relationship between the parties is a specialized one relating to property development and construction and specialized services rendered by the plaintiff to the defendant, which is objectively ascertainable *ex facie* the agreement and the pleadings. She submitted that the arbitration clause is drafted with care and detail to depict exactly how disputes or differences are to be resolved. She also submitted that the parties elected to have an industry expert from the ranks of the Namibian Council for Architects and Quantity

[2] [2007] 4 All ER 951 (HL), quoted with approval in this jurisdiction in the matters of *Rivoli Namibia (Pty) Ltd vs Salini Namibia (Pty) Ltd* (HC-MD-CIV-ACT-CON2018/02271) [2019] NAHCMD 528 (04 December 2019) and *Opuwo Town Council v Dolly Investments CC* (1) [2018] NAHCMD 309 (24 September 2018).

Surveyors to act as an arbitrator, undoubtedly due to the nature of the agreement and the fact that an industry expert will be best suited to adjudicate such disputes or differences.

[18] Mr Pretorius, on the other hand, argued that the dispute between the parties relates to a contractual claim for the payment of monies for services rendered. This is far removed from the scope of expertise of an Architect or Quantity Surveyor, so he argued. To cement his argument, Mr Pretorius referred to the fact that, neither party filed any expert summaries and reports. He argued that although the dispute pending before the court emanates from a construction agreement to render site management services, it is not, strictly speaking, a construction dispute which would be best determined by an Architect or Quantity Surveyor. It is a contractual dispute falling squarely within the scope of expertise of this Court and will therefore be best determined by this Court, so he argued.

[19] Mr Pretorius further submitted that for the plaintiff or the defendant to be obligated to refer this contractual dispute to arbitration before an arbitrator appointed from the ranks of the Namibia Council for Architects and Quantity Surveyors, who will invariably not be qualified or experienced to determine disputes of this nature, and whose finding will be final and binding on the parties, will not make commercial sense. By making use of the word 'may' as opposed to 'must' the parties agreed to allow the aggrieved party the discretion whether or not to refer the dispute to arbitration.

[20] Another question initially raised by the parties was whether or not the arbitration clause can oust the jurisdiction of this Court.

[21] Mr Pretorius in this regard argued that the arbitration clause cannot oust the jurisdiction of this Court since the parties to a contract cannot exclude the jurisdiction of this court by agreement.[3] He submits on the above arguments, the defendant's special plea is bad in law and should be dismissed with costs.

[3] *The Rhodesian Railways Ltd V Mackintosh* 1932 AD 359 at 375; *Namibia Wildlife Resorts (Pty) Ltd v Ingplan Consulting Engineers & Project Managers (Namibia) (Pty) Ltd and Another* (SA 55 of 2017) [2019] NASC 584 (12 July 2019).

[22] To counter this argument, Ms Van der Westhuizen relied on the matter of *NWR (Pty) Ltd v Ingplan Consulting Engineers and Project Managers Pty Ltd and Another,*[4] where the Supreme Court expressed the legal position with respect to contractual arbitration clauses as follows:

'[26] The starting point in this dispute is clause 9 of their agreement. It is quoted in full above. 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 agreed 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 Act).

[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 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." For juristic persons, it is the very essence of their existence and the means through which they engage in transactions towards the realisation of their constituent objectives."

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

"*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.'

[4] (SA 55 of 2017) [2019] NASC 584 (12 July 2019).

[23] Ms Van Der Westhuizen argues that for reasons stated hereinabove in support of the defendant's case, the special plea should succeed.

Analysis

Use of the word 'may'

[24] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[5] the Supreme Court of Appeal in South Africa at paragraph 18, expressed itself as follows regarding the current legal position in respect of interpretation:

> 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

[25] and continues at para 26:

> 'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[26] As inviting as the defendant's arguments appear to be, I hold the view that the plaintiff's argument that the use of the word 'may' in clauses 16.1 and 16.11 of the agreement is unambiguous and should be given its ordinary meaning. The said meaning confers a discretionary power upon any of the parties to either refer the dispute to arbitration or whether to have a dispute resolved by arbitration or in a court of law.

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[5] [2012] 2 All SA 262 (SCA).

<u>Is the Court's jurisdiction ousted?</u>

[27] Although raised by the parties in their written arguments, this issue was settled during oral submissions where parties were *ad idem* that the arbitration clauses in the agreement do not oust the jurisdiction of the court.

[28] The court in *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd,*[6] discussed arbitration clauses in agreements between parties and the effect of such clauses on the jurisdiction of the court and remarked as follows:

> 'In our law an arbitration clause does not oust the jurisdiction of the Court and, if a party to an agreement seeks to rely on an arbitration clause when sued on that agreement, the Court has a discretion as to whether or not it should itself determine the dispute or whether it should order the proceedings to be stayed pending the arbitrator's decision.
>
> As an arbitration clause in a contract does not preclude the jurisdiction of the Court, it is incumbent on a defendant, who seeks to rely on such a clause, to file a special plea and ask that the action instituted by the plaintiff be stayed pending the determination of the dispute by arbitration. <u>What this Court has to decide is whether any grounds exist upon which the Court's jurisdiction is ousted</u>. The fact that grounds exist on which a trial Court would probably order a stay of proceedings does not mean that the Court has no jurisdiction in the action which Nissho has instituted.'

[29] In determining whether the plaintiff has advanced compelling reasons to resist the stay of the dispute pending mediation and arbitration, regard will, in the exercise of my discretion, be given to the conduct of the defendant in this matter. I will revert in due course to the exercise of my discretion in deciding on whether or not proceedings should be stayed pending arbitration or not. I, however, deem it apposite to first deal with the purpose of judicial case management (JCM).

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[6] 1977 (4) SA 682 (C) at paragraph 692e-h.

Purpose of JCM

[30] The purpose of JCM, was summarised by the Supreme Court in *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*[7] at as follows:

'[89] The main purpose of the JCM is to bring about a change in litigation culture. The principal objectives of the JCM are to: ensure that parties to litigation are brought as expeditiously as possible to a resolution of their disputes, whether by way of adjudication or by settlement; increase the cost effectiveness of the civil justice system and to eliminate delays in litigation; promote active case management by the courts and in doing so, not only facilitate the expeditious resolution of disputes, but also bearing in mind the position of other litigants and the courts' own resources; and inculcate a culture among litigants and their legal representatives that there exists a duty to assist the court in furthering the objectives of JCM.

[90] With the advent of the JCM Rules where all parties to the proceedings have the obligation to prosecute the proceedings and assist the Court in furthering the underlying objectives, it would be highly relevant to consider any inaction on the part of the parties. And there is no place for defendants to adopt the attitude of "letting sleeping dogs lie" and for a defendant to sit idly by and do nothing, in the hope that sufficient delay would be accumulated so that some sort of prejudice can then be asserted'.

[31] In a similar vein to this court in *Stuurman v Mutual & Federal Insurance Company of Namibia Ltd*,[8] it was held that:

'[14] A party is bound by its counsel's conduct of pleadings and arrangements entered into in the conduct of a case, unless there is a satisfactory explanation for the inferences not to be drawn.

[21] Parties engaged in litigation are bound by the agreements they enter into, limiting or defining the scope of the issues to be decided by the tribunal before which they appear, to the extent that what they have agreed is clear or reasonably ascertainable'.

[7] (SA 23 of 2010) [2012] NASC 15 (13 August 2012).
[8] (SA 18 of 2008) [2009] NASC 4 (17 March 2009).

[32] With key objectives of JCM in mind, I shall now highlight the conduct of the defendant in this matter.

[33] The defendant raised the common law defense of arbitration by way of a special plea and further delivered its plea on the merits. It is surprising to note that the defendant opted to pursue its alleged counterclaim against the plaintiff by way of the alternative dispute resolution procedure provided for in clause 16 of the agreement, as this means that before court there exists no counterclaim. No steps have been taken by the defendant to have the dispute regarding the defendant's alleged counterclaim determined to date.

[34] Subsequent to the defendant raising its special plea, it took no meaningful steps to have its special plea heard. On the contrary, the defendant made discovery and participated in the judicial case management process up to the point where a pre-trial order was made. The defendant even delivered witness statements thus signaling its readiness for trial.

[35] At the case planning conference stage, the defendant could have, and should have, taken steps to have its special plea heard. It did not do so.

[36] In the joint case management report dated 25 November 2021, the parties agreed as follows: that they shall file witness statements and any expert summaries on or before 25 February 2022; that no interlocutory applications are foreseen; that no determination of any objection on points of law is foreseen; that no orders or directions for a separate hearing regarding any relevant issue are foreseen and that no issues that are likely to facilitate the just and speedy disposal of the action are foreseen. On the basis of the joint case management report, the matter was postponed for a pre-trial conference hearing.

[37] The parties duly filed their witness statements on 25 February 2022 and further filed their joint pre-trial report on 03 March 2022 as ordered by the court. The matter was then ready for trial.

[38] The defendant failed, as illustrated above, to advise the court of its intention have its special plea heard, separate from the merits of the matter. All the issues agreed to in the joint case management report as stated above and the pre-trial report includes: an agreement to dates for filing witness statements; subsequent filing of witness statements; agreement to advise the court that there were no interlocutory applications foreseen; agreement that no determination of any objection on points of law is foreseen; that no orders or directions for a separate hearing regarding any relevant issue are foreseen and that no issues that are likely to facilitate the just and speedy disposal of the action are foreseen, reveals one relevant common factor, that the defendant failed to alert the court of its intention to pursue the special plea of arbitration divorced from the trial.

[39] It is important to note that a case management report and pre-trial agreement bind the parties. The order is a compromise through and through. See: *Farmer v Kriessbach.*[9]

[40] The following rudimentary principle of law applied by this Court in the case of *Standard Bank Namibia Limited v Alex Mabuku Kamwi*[10] is apropos. It was stated that:

> '[20] It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but himself. (R H Christie, *The Law of Contract in South Africa*, 5th ed (2006): pp 174 – 175). This is the *caveat subscriptor* rule which Ms Williams reminded the court about. And the true basis of the principle is the doctrine of quasi mutual assent; the question is simply whether the other party (in this case the plaintiff) is reasonably entitled to assume that the signatory (in this case the defendant), by signing the document, was signifying his intention to be bound by it (see Christie, *The Law of Contract in South Africa*, ibid., p. 175). The only qualification to the rule is where the signatory had been misled either as to the nature of the document or as to its contents. (Christie *The Law of Contract in South Africa*, ibid., p 179)'

[9] I 1408/2010 – I 1539/2010 [2013] NAHCMD 128 (16 May 2013) para 4.
[10] (I 2149/2008 [2013] NAHCMD 63 (7 March 2013).

[41] I similarly agree that the full force of the *caveat subscriptor* rule must apply in these proceedings. It follows that the defendant is bound by the case management report and pre-trial agreement and if this order is not to the defendant's liking the defendant has no one to blame but itself.

[42] It is a common thread that where parties have elected to limit the ambit of a case by agreement, the election is usually binding and that a party cannot resile from an agreement of that nature without the acquiescence of the other party or the approval of the court on good cause shown. This was explicitly set out in the *Stuurman* case supra. Similarly, in *Scania Finance Southern Africa (Pty) Ltd v Aggressive Transport CC,*[11] Smuts J pointed out that:

> 'This approach has now been trenchantly reinforced by rule 37(14) when a matter is the subject of case management and for good reason. The parties have after all agreed upon the issues of fact and law to be resolved during the trial and which facts are not to be disputed. That agreement, as occurred in this matter, is then made an order of court. Plainly, litigants are bound by the elections they make when agreeing upon which issues of fact and law are to be resolved during the trial and which relevant facts are not in dispute when preparing their draft pre-trial order. It is after all an agreement to confine issues which is binding upon them and from which they cannot resile unless upon good cause shown. It is for this reason that the rule giver included rule 37(14). <u>To permit parties without a compelling and persuasive explanation to undo their concurrence to confine issues would fundamentally undermine the objectives of case management. It would cause delays and the unnecessary expense of an interlocutory application and compromise the efficient use of available judicial resources and unduly lengthen proceedings with the consequent cost implications for the parties and the administration of justice</u>.'

[43] I associate myself with the above remarks made by Smuts J in the *Scania* case *supra.* The common thread that runs through the judgments of this court is that a change of front calls for an explanation. No party should be permitted to resile or amend a case management report or pre-trial agreement unless there is a justifiable explanation or error.

[11] (I 3499/2011) [2014] NAHCMD 19 (22 January 2014).

[44] Sight should not be lost of the legal position that generally the court should refer a matter to arbitration as per the intention of the parties except if there is a strong case why the referral should not occur.

[45] The failure to advise the court at the case management stage and at the pre-trial stage and in fact advising the court to the contrary, as alluded to above, allowed the court proceedings to proceed to the closure of filing of pleadings and have the matter ready for trial. It is inevitable that in the process, the parties suffered heavy legal costs and time wastage. This is an ordeal eminent to reoccur, in my view, if this matter is referred to arbitration at this late stage of the court proceedings.[12]

Conclusion

[46] In the circumstances of the findings and conclusions reached hereinabove, and in the exercise of my discretion, I hold that delay to ensure that the special plea is heard prejudices the plaintiff and inconveniences the court after completion of the process of filing of pleadings. This matter is ready for trial and such readiness is further apparent from the joint case management report and the joint pre-trial report filed by agreement between the parties.

[47] I hold the view that for the above reasons, it is in the interest of the administration of justice to refuse the application to stay the court proceedings and refer the matter for arbitration. In view of the foregoing, I hold that the special plea of the defendant falls to be dismissed.

Costs

[48] The normal rule that applies to issues relating to costs, is that the costs should follow the event. There is no reason in law or logic as to why this rule should not apply in this matter. I was further not referred to any such reason by any of the parties, nor, could I find any such reason.

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[12] See: *Buildwise Manufacturing Distribution CC v New Era Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/00511) [2022] NAHCMD 74 (24 February 2022) para 21.

[49] I am alive to the fact that a refusal to grant a special plea is interlocutory in nature. Rule 32(11) of the Rules of this court provides for a cap on costs awarded in interlocutory applications. I have not been persuaded to apply costs beyond the said cap.

Order

[50] In the result, it is ordered that:

(a) The defendant's special plea of arbitration is dismissed with costs, which are capped in terms of rule 32(11).

(b) The matter is postponed to 9 June 2022 at 08:30 for a pre-trial conference hearing.

(c) Parties must file a duly signed revised joint pre-trial report and an additional copy thereof in word format on or before 3 June 2022.

Sibeya J

JUDGE

APPEARANCES:

PLAINTIFF:	F Pretorius
	Francois Erasmus & Partners
DEFENDANT:	C E Van Der Westhuizen
	Instructed By Dr Weder, Kauta & Hoveka, Inc