

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: ADIDAS (South Africa) (Pty) Ltd and Roland Donovan Jacobs t/a Streethouse Namibia	Plaintiff Defendant	Case No: HC-MD-CIV-ACT-CON-2019/02339	Division of Court: Main Division	Heard on: 27 July 2022
Heard before: Honourable Mr. Justice Usiku		Delivered on: 01 September 2022		
Neutral citation: <i>ADIDAS (South Africa)(Pty) Ltd v Jacobs</i> (HC-MD-CIV-ACT-CON-2019/02339) [2022] NAHCMD 451 (01 September 2022)				
Order:				
<ol style="list-style-type: none">1. The defendant's special plea of lack of jurisdiction, is dismissed.2. The defendant is ordered to pay the costs of the plaintiff occasioned by the special plea, such costs are to include costs of one instructing and one instructed counsel.3. The matter is postponed to 28 September 2022 at 15h15 for status hearing and allocation of trial dates.4. The parties shall file a joint status report on or before 21 September 2020.				
Reasons for order:				
B USIKU J:				

Introduction:

[1] The issue for determination by this court is whether the special plea of lack of jurisdiction raised by the defendant in his plea to the plaintiff's particulars of claim, should be upheld.

[2] In his plea, the defendant avers that clause 19(k) of the agreement relied upon by the plaintiff provides as follows:

'The contract and any other contract between the seller and the buyer shall be deemed in all respects as being performed and construed according to the laws of South Africa and the parties submit to the exclusive jurisdiction of the Western Cape High Court, CapeTown.'

[3] The defendant, therefore, asserts in his plea that, given the fact that the parties agreed to the exclusive jurisdiction of the Western Cape High Court in Cape Town, this court has no jurisdiction to entertain any proceedings at the behest of the plaintiff.

[4] At the present, the parties have filed their respective witness statements and the court has issued a pre-trial order and the whole action is ripe for trial. The main matter was set down for trial for the period of 07 to 11 March 2022, however, trial could not proceed on account that the defendant's special plea needed to be determined first.

[5] On 21 July 2022, the issue of the special plea was argued before me on the papers without any evidence having been led by the defendant.

The special plea

[6] During argument, counsel for the defendant contends that it is not the argument of the defendant that this court does not have jurisdiction. The defendant argues that, the court has discretion whether or not to exercise that jurisdiction. Counsel for the defendant further argues that by reason of clause 19(k) of the agreement, the parties are bound to submit to the jurisdiction of the Western Cape High Court and therefore the parties must be held to their agreement.

[7] Counsel for the plaintiff, on the other hand, contends that the defendant did not adduce evidence to support his special plea. On the pleadings, the defendant acknowledges that he resides in Namibia. The cause of action arose in Namibia. There is no evidence led by the

defendant on why the court should decline to exercise its jurisdiction.

Analysis

[8] It is a settled principle that a foreign jurisdiction clause in an agreement does not exclude this court's jurisdiction. In other words, the parties to an agreement may not exclude the jurisdiction of the court, by their agreement. The court has discretion in deciding whether or not the exercise of that jurisdiction should be stayed pending the outcome of foreign proceedings.¹

[9] In the matter of *SWANU of Namibia v Katjivirue*², the court set out the difference between exceptions and special pleas. It observed that an exception is confined to the four corners of the pleadings. An excipient must accept that the factual allegations contained in the pleading concerned are correct and may not introduce new evidence. On the other hand, a special plea does not appear *ex facie* the pleading. A special plea has to be established by the introduction of fresh evidence, outside the circumference of the pleading and those facts have to be established in the usual way. The court also observed that there are special pleas that are capable of being decided on the pleadings as they stand without a need to adduce evidence in support thereof. And there are special pleas that require the adduction of evidence.

[10] In the present matter, I am of the opinion that evidence was required to be led to establish why the court is being called upon to exercise its discretion and uphold the special plea.

[11] Presently, there are no facts placed before court on which the special plea can be determined. I am therefore, of the view that in the absence of facts supporting the special plea, the special plea stands to be dismissed.

[12] As regards the issue of costs, I am of the view that the general rule that costs follow the result must find application.

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

1. The defendant's special plea of lack of jurisdiction, is dismissed.
2. The defendant is ordered to pay the costs of the plaintiff occasioned by the special plea, such costs are to include costs of one instructing and one instructed counsel.
3. The matter is postponed to 28 September 2022 at 15h15 for status hearing and

¹ *Foize Africa v Foize Beheer BV* 2013 (3) SA 91 at 99 F-H.

² HC-MD-CIV-ACT-OTH-2021/03315 [2022] NAHCMD 98 (09 March 2022) at para 17-18 and 25.

allocation of trial dates.

4. The parties shall file a joint status report on or before 21 September 2020

Judge's signature	Note to the parties:
B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
T Muhongo (with him GK Losper) Instructed by LorentzAngula Inc., Windhoek	L Lochner (with him A Naude) Of Dr Weder, Kauta & Hoveka, Windhoek