

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case number: **HC-MD-CIV-ACT-CON-2021/00952**

WV CONSTRUCTION (PTY) LTD

PLAINTIFF

and

**BARNARD MUTUA SCRIBA ARCHITECTS LDA
(PREVIOUSLY BARNARD MUTUA ARCHITECTS LDA)**

DEFENDANT

Neutral citation: *WV Construction (Pty) Ltd vs Barnard Mutua Scriba Architects LDA (Previously Barnard Mutua Architects LDA)* (HC-MD-CIV-ACT-CON-2021/00952) [2023] NAHCMD 264 (12 May 2023)

Coram: **NDAUENDAPO J**

Heard: **14 March 2023**

Ruling: **08 May 2023**

Reasons: **15 May 2023**

Flynote: Arbitration — Contract Containing arbitration clause — Clause in peremptory terms — Parties intended to refer dispute to arbitration — Special plea of arbitration upheld — Proceedings stayed pending the dispute being referred to arbitration.

Summary: On 7 April 2019, the plaintiff and defendant entered into a building contract. In terms of the contract, the plaintiff became obligated to renovate the exterior façade of the MTC head office in Windhoek for defendant as employer. The plaintiff became obligated to pay the plaintiff the sum of N\$4 315 937.39. In terms of

the contract, the defendant was both the principal agent as well as the architect. On 21 January 2021, the defendant as principal agent certified an amount of N\$1 488 998.40 as final amount and retention due by it as employer, to plaintiff. Defendant only paid an amount of N\$302 116.55 to the plaintiff and the balance of N\$1 186 881.85 remains unpaid. The plaintiff sued the defendant for that amount, i.e. N\$1 186 881.85. The contract contains an arbitration clause. Defendant raised a special plea that the matter be referred to arbitration and the proceedings be stayed pending the proceedings being brought under clause 26 of the contract. The plaintiff replicated stating that the defendant's special plea does not contain allegations setting out underlying jurisdictional facts to sustain a special plea of arbitration claiming a stay of proceedings and that the defendant does not demarcate the dispute in its special plea.

Held: that clause 26 uses expressions such as dispute or difference 'under' 'the contract and peremptory terms such as 'shall' and in my view that is a clear demonstration that the parties intended to employ the machinery provided for in clause 26 to resolve their differences.

Held further: that by so agreeing, the parties exercised their freedom to contract and to agree as to how their differences should be resolved. And the court must give effect to their wishes.

Held further: that the special plea of arbitration is upheld and the proceedings are stayed pending proceedings to be brought under clause 26 of the contract.

ORDER

1. The special plea of arbitration raised by the defendant is upheld
2. The proceedings are stayed pending the proceedings to be brought under clause 26 of the building contract.
3. The plaintiff is ordered to pay the costs of the defendant, including the costs of one instructing and one instructed counsel.

4. The matter is removed from the roll.

JUDGMENT

NDAUENDAPO J

Introduction

[1] Before me is a special plea of arbitration raised by the defendant.

[2] The plaintiff is WV Construction, a private company with limited liability, duly incorporated and registered in terms of the relevant company laws of the Republic of Namibia, having main place of business at 507 Dante Street, Prosperita, Windhoek.

[3] The defendant is Barnard Mutua Scriba Architects, a firm of Architects, having its main place of business at 18 Liliencron Street, unit 5, the Village, Eros, Windhoek.

Background

[4] On 7 April 2019, the plaintiff and defendant entered into a building contract. In terms of the contract, the plaintiff became obligated to renovate the exterior façade of the MTC head office in Windhoek for defendant as employer. The plaintiff became obligated to pay the plaintiff the sum of N\$4 315 937.39.

[5] In terms of the contract, the defendant was both the principal agent as well as the architect. On 21 January 2021, the defendant as principal agent certified an amount of N\$1 488 998.40 as final amount and retention due by it as employer, to plaintiff. Defendant only paid an amount of N\$302 116.55 to the plaintiff and the balance of N\$1 186 881.85 remains unpaid. The plaintiff sued the defendant for that amount, i.e. N\$1 186 881.85.

Special plea

[6] The defendant raised a special plea to the claim. The special plea is couched in the following terms:

'1. Plaintiff's claim and cause of action is derived from a written building contract concluded between the parties.

2. Clause 26 of the Building Contract provides that any dispute between the parties must be dealt with on the basis stated therein and if any party is still aggrieved by such decision, then by way of arbitration.

3. Inasmuch as the defendant disputes the claim so instituted against it by the plaintiff, the defendant avers that the current claim and dispute is one as envisaged in clause 26 of the Building Contract.

4. Plaintiff has not refereed the dispute in accordance with the dispute resolution envisaged in clause 26 nor has it referred same to arbitration.

Wherefore the defendant prays the plaintiff's action should be stayed with costs, pending the final determination of the dispute in accordance with clause 26 of the Building Contract.'

[7] The arbitration clause in the Building contract is couched in the following terms:

'26. DISPUTES AND ARBITRATION

26.1 If any dispute or difference shall arise between the Employer or the Principal Agent on his behalf, and the Contractor, either during the progress or after completion of the Works or after the determination of the employment of the contractor under this contract, abandonment or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder, or as to the withholding by the Principal Agent of any certificate to which the Contractor may claim to be entitled, then the Principal Agent shall determine such dispute or difference by a written decision given to the Contractor and Employer.

26.2 The said decision shall be final and binding on the parties, unless the Contractor or the Employer within fourteen days of the receipt thereof by written notice to the principal Agent disputes the same, in which case or in case the Principal Agent for fourteen days after a written request to him by the Employer or the

Contractor fails to give a decision as aforesaid, such dispute or difference shall be and is hereby referred to adjudication in accordance with the attached Rules for Adjudication. The adjudicator shall be any person agreed by the parties or failing agreement appointed in accordance with the Rules.

26.3 If a party is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the Rules, either party may give notice of dissatisfaction referring to this clause within 14 days of receipt of the decision or the expiry of the time for the decision. If notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator.

26.4 A dispute which has been the subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the Rules specified in the appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Annexure. Any hearing shall be held in the language referred to in Clause 8 of the Articles of Agreement. The Arbitration shall be held and conducted in accordance with the Rules of the Association of Arbitrators (Southern Africa) current at the date when the dispute is referred to arbitration.'

Submissions on behalf of defendant

[8] Mr Strydom referred to clauses 26.1 and 26.2 as in so far as the defendant disputed the claim instituted against it by the plaintiff. The defendant avers that the current claim and dispute is one as envisaged in clause 26 of the Building contract. Plaintiff has not referred the dispute in accordance with the dispute resolution envisaged in clause 26 nor has it referred same to arbitration.

[9] Mr Strydom submitted that by virtue of the aforesaid, the plaintiff's action should be stayed with costs, pending the final determination of the dispute in accordance with clause 26 of the Building Contract.

[10] He further submitted that having regard to the pre-trial order, it is evident that the issue of dispute resolution as contemplated in the contract is much alive to the

issues of law which the court should decide. As such, it is submitted that the defendant's insistence on having this matter be dealt with separately is justified, both in respect of what has been pleaded as well as in respect of the issues so defined and which the court is called upon to adjudicate.

[11] Counsel argued that the *Universiteit van Stellenbosch*¹, the matter which the plaintiff relied on, is distinguishable from the present matter.

Submissions on behalf of the plaintiff

[12] Mr Olivier submitted that the Defendant, the employer, and the principal agent, is one and the same person. He submitted that the dispute resolution clause relied on by defendant entails that disputes must be determined by himself in his capacity as principal agent first.

[13] The dispute resolution process thereafter, makes provision that in the event of dissatisfaction with his determination, the matter is referred to adjudication and thereafter if needed, to arbitration.

[14] He contended that this is the process that plaintiff is expected to follow to have its dispute, according to defendant, addressed.

[15] He submitted that irrespective of whether or not the dispute referred to by defendant in its special plea is clearly identified or not, and on the hypothetical acceptance that such dispute refers to the plaintiff's claim for payment and defendant's reasons pleaded for non-payment (and over and above the fact that no certification in terms of clause 19 is alleged), the fact remains that it will be expected of defendant to determine this dispute first and his determination will then proceed to adjudication in the event of the plaintiff's dissatisfaction with his determination.

[16] Counsel argued that the arbitration clause should not be enforced in circumstances where it entails that the defendant can contractually determine the dispute between himself and the plaintiff. The same applies when it is a dispute between the plaintiff and principal agent.

¹ *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983(4) SA 321(A).

[17] Counsel further argued that the defendant cannot act as an agent for himself. This applies whether or not there are further steps (adjudication and arbitration) available or not. Counsel submitted that a magistrate cannot be allowed to pronounce judgment in a matter where he is a party just because there are appeal or review remedies available to the dissatisfied party.

[18] Counsel referred this court to *Universiteit van Stellenbosch v J A Louw (Edms) Bpk*² 1983(4) SA 321(A) where it was held that:

'the architect(third defendant),when giving his decision on the dispute which would have to be referred to him in terms of clause 26 before it was referred to arbitration, would have to give a decision on a state of affairs for which it had been alleged that he was partly or totally responsible: there could be no doubt that the architect would be in an anomalous and embarrassing position, and a more undesirable position or one more likely to cause a certifier or an arbitrator to be biased or partial could not be imagined'

At p 341 referring to the judgment in the court a quo the AJA Galgut said:

'In coming to this conclusion the learned judge did not have regard to the anomalous and embarrassing position of the third defendant as detailed above. Nor did he have sufficient regard to the danger of bias and partiality. These are factors which, in my view, disqualify third defendant.'

[19] Counsel contended that no consideration of bias need to be analyzed herein as the defendant and the principal agent are one and the same person.

Pre-trial order

[20] In the pre- trial order, the issues for determination relating to the special plea are set out as follows:

'a. Whether in law the current action should be stayed pending the determination thereof in accordance with the provisions of clause 26 of the building contract?

² *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983(4) SA 321(A).

- b. Whether in law and procedure defendant's special plea lacks the facts and particularity and contain allegations necessary to set out the underlying jurisdictional facts to sustain a special plea of arbitration claiming the stay of proceedings?
- c. Whether in law the defendant properly demarcated the dispute in its special plea?
- d. Whether in law and upon relying on an arbitration clause it is at all necessary for the defendant to demarcate the dispute forming the subject matter of the claim in circumstances where such claim and defense are already fully ventilated in the pleadings filed of record?
- e. Whether defendant in law ought to have and did plead the preconditions contained in the contract for commencing arbitration or that the preconditions provided for in the contract for commencing in arbitration have been complied with?
- f. Whether defendant ought to have pleaded that the ambit of the arbitration clause relied on covers the dispute?
- g. Whether defendant's failure to allege that the certificate in writing have been made by the principal agent as provided for in clause 19 of the contract, no dispute has been disclosed by defendant or indeed existed to be referred to arbitration.
- h. Whether plaintiff would be seriously prejudiced if the dispute is referred to arbitration in that it is a prerequisite in terms of the dispute resolution clause relied on, that defendant as principal agent has to determine such dispute first as provided for in the contract and consequently:
- i. In that defendant as both principal agent and employer/contracting party, will be a judge in its own cause, and;
 - ii. Stands to be inclined to determine such dispute in its own favor since doing so entails a saving of in excess of 27% of the contract value, and;
 - iii. not with the impartiality required from a principal agent holding relevant professional qualifications and affiliations demanded by the contract, and;
 - iv. the model form contractual provisions do not envisage and by its nature do not cater for a situation where the employer and principal agent is the same entity.

i. Whether in law the court should order that the dispute be referred to arbitration in terms of the provisions of Section 3(2) (b) of the Arbitration Act 42 of 1965?

j. Whether defendant has waived his rights to rely on the dispute resolution provisions in the contract by failing to determine the dispute in its capacity as principal agent and has refused to cooperate towards the referral of the dispute to adjudication?

Applicable legal principles

[21] In *Radial Truss v Shipefi*³ the court held that:

'[14] 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* (1943 AD 393) the then Appellate Division quoting from the speech of Viscount Simon, L.O, in the English case of *Heyman v Darwins Ltd*(1942,A.ER 337) said: "If, however, the parties are at one 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 'with regard to ', or ' under' the contract, and an arbitration clause which uses these, or similar expressions, should be construed accordingly.'

[22] Clause 26 uses expressions such as dispute or difference 'under' the contract and peremptory terms such as 'shall' and in my view that is a clear demonstration that the parties intended to employ the machinery provided for in clause 26 to resolve their differences.

[23] Counsel for the plaintiff contended that no consideration of bias need to be analyzed herein as the defendant and the principal agent are one and the same person. That may be so, but that is what the parties agreed to in writing and the court must give effect to the wishes of the parties.

[24] By so agreeing, the parties exercised their freedom to contract and to agree as to how their differences should be resolved, as it was said in *NWR (Pty) Ltd v Ingplan consulting Engineers and project Managers & Another*:⁴

³ *Radial Truss v Shipefi* HC-MD-CIV-ACT-CON-2018/03205.

⁴ *NWR (Pty) Ltd v Ingplan consulting Engineers and project Managers & Another* [2019] NASC 584 (12 July 2019).

[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 agreed not to litigate.*

[27] *By so agreeing to arbitration, the parties exercised their contractual freedom to define how disputes between them are to be resolved-by arbitration.'*

[25] In the replication to the special plea, the plaintiff pleads, inter alia, that the plaintiff does not demarcate the dispute in the special plea and that the defendant does not plead that the preconditions contained in the contract for commencing arbitration have been complied with. The answer to that is provided for in clause 26.1 and by employing the machinery set out in clause 26, those issues will be addressed.

[26] Plaintiff further avers in the replication that it will apply to court to order that the dispute not be referred to arbitration in terms of the provisions of s 3(2) (b) of the Arbitration Act 42 of 1965 (the Act). Section 3 of the Act provides that the courts in general should adhere to the provisions of the arbitration agreement unless and upon application by a party such provision is set aside or the court rules that the dispute in question should not be so adjudicated.

[27] In *Sera v de Wet*,⁵ the court held that

'A party feeling aggrieved by an arbitration clause should apply to the court to have it set aside and is further required to show good cause why such relief should be granted in his favor. In this regard the applicant carries the onus to show such good cause.'

[28] In this matter, no such application was brought by the plaintiff and therefore, the court will not entertain such a relief by the plaintiff.

[29] For all these reasons, I am satisfied that the Defendant has made out a case for the relief prayed for in the special plea.

⁵ *Sera v de Wet* 1974(2) SA 645 (T) at 650.

[30] One matter remains and that is the issue of costs. Counsel for the defendant submitted that the upholding of the special plea effectively ends the proceedings in this court. As such, a cost order should be construed to constitute a full cost of these proceedings, which ventilates all the steps so taken by the parties since the institution of the action until the preparation for trial as well as the wasted costs occasioned at the trial.

[31] I fully agree with that submission, as the matter will now be dealt with in accordance with the machinery provided for in clause 26.

Conclusion

[32] For the above reasoning, I make the following order:

1. The special plea of arbitration raised by the defendant is upheld.
2. The proceedings are stayed pending the proceedings to be brought under clause 26 of the building contract.
3. The plaintiff is ordered to pay the costs of the defendant, including the costs of one instructing and one instructed counsel.
4. The matter is removed from the roll.

NDAUENDAPO

Judge

APPEARANCES:

PLAINTIFFS: J. OLIVIER
DU PISANI LEGAL PRACTITIONERS

DEFENDANTS: J. STRYDOM
INSTRUCTED BY
ENGLING, STRITTER & PARTNERS