

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
EX TEMPORE JUDGMENT

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| Case Title: Ekwakuti Trading CC and Omarichman Printing CC | Plaintiff Defendant | Case No: HC-MD-CIV-ACT-CON-2022/01146 Division of Court: High Court Main Division |
| Heard before: The Honourable Justice Schimming-Chase | Delivered on: 9 February 2023 | |
| Neutral citation: <i>Ekwakuti Trading CC v Omarichman Printing CC</i> (HC-MD-CIV-ACT-CON-2022/01146) [2023] NAHCMD 42 (9 February 2023) | | |
| The order: <ol style="list-style-type: none">1. The special plea is dismissed.2. There shall be no order as to costs.3. The matter is postponed to 13 March 2023 at 15:30 for a Status hearing to enable the defendant to obtain legal representation.4. The parties are directed to file a joint status report on or before 8 March 2023. | | |

Reasons for order:

[1] On 17 March 2022, the plaintiff issued summons against the defendant claiming amounts of N\$432,752 and N\$446,440, respectively. The plaintiff's claim is premised on a written agreement for the sale and purchase of printing paper which was concluded between the parties duly represented on 13 September 2021 and at Windhoek. The plaintiff's second claim is premised on damages allegedly suffered by the plaintiff in mitigating its losses.

[2] The defendant filed a special plea of arbitration proceedings which reads as follows:

'1.1 The defendant pleads specially that the manner in which the plaintiff sought to resolve the dispute is in violation of the agreement entered into between the parties. It is common cause that the parties agreed to resolve the dispute through an arbitrator rather than through courts (refer to the attached exhibit "OMA3").

1.2 There is no evidence before this Honourable Court that the plaintiff sought to arbitrate the matter before approaching the court. The plaintiff did not testify that it has not seen or read the clause of dispute resolution that dispute should be resolved through an arbitrator. It goes without saying that arbitration is cheap, fast and private and was the best way to have handled this case.'

[3] The plaintiff delivered a replication to the special plea. In essence the replication states that the clause on dispute resolution in the agreement provides that disputes regarding the agreement will be resolved through mediation, arbitration or through the courts. Thus the court's jurisdiction is not excluded by the dispute resolution clause as it stands in the agreement.

[4] The agreement appears to be a standard form. The clause of the agreement so relied on by the defendant reads as follows:

' These additional elements can also be included

Dispute resolution: Whether disputes regarding the agreement will be resolved through mediation, arbitration, or through the courts.

Arbitrator- How the parties will communicate and send notices to each other'

[5] The defendant appearing in person argues that the mention of 'arbitrator' in the clause of the agreement shows that it was the intention of the parties to resolve disputes through an arbitrator. Further that the abovementioned provision should be read and understood in ordinary English, namely the agreement permits three options for dispute resolution, namely 'mediation', 'arbitration' or 'through the courts' and that the parties chose to go by way of arbitration.

[6] The defendant also relies in argument on s 6 of the Arbitration Act No 42 of 1965 ("Arbitration Act"), however, this is not included in the special plea. As such, the defendant cannot rely on the provisions of s 6 of the Arbitration Act.

[7] Prinsloo J held in *Namibia Power Corporation (Pty) Ltd v Congo Namibia Pty Ltd*¹ that in terms of the common law, an arbitration defence is raised by way of a dilatory plea (special plea). The purpose thereof is to obtain a stay of the proceedings pending the final determination of the dispute by way of arbitration. However, due to the very nature of the special plea it does not afford a defendant an absolute defence and its purpose is merely to determine the correct forum to which the parties submit themselves. It was held in addition that the defendant's failure to pursue s 6 of the Arbitration Act does not prohibit the defendant from proceeding with a special plea, as it did. However if the defendant did not so proceed to apply for a stay in terms of the Arbitration Act, he or she cannot rely on its provisions at a later stage.

[8] It is the plaintiff's argument that upon proper interpretation of the contractual agreement, particularly the clause relating to dispute resolution, the clause does not dictate which forum the parties must submit themselves to, but rather gives the parties the option to elect which forum they choose to resolve their dispute. The plaintiff argues that the language used should

¹ *Namibia Power Corporation (Pty) Ltd v Congo Namibia Pty Ltd* (HC-MD-CIV-ACT- CON-2019/03067) [2021] NAHCMD 210 (5 May 2021) par 35-38.

be deduced in light of the terms of the said clause to establish the intention of the parties.

[9] The plaintiff further argues that the defendant must meet the jurisdictional facts in order for its special plea to be upheld, which jurisdictional facts are as follows:

- (a) The existence of a written arbitration clause or agreement;
- (b) That the arbitration clause or agreement is applicable to the dispute between the parties;
- (c) That there exists a dispute between the parties which dispute must be demarcated in the special plea; and
- (d) That all the pre-conditions contained in the agreement to commence arbitration have been met.

[10] The plaintiff further refers the court to the matter of *De Witt v Overo Investments CC*² in which it was held that arbitration is consensual and that it depends on the intention of the parties as expressed in their agreement.

[11] Considering the terms of the clause in question, which of itself is not a model of clarity, it is clear that the parties agreed that any dispute stemming from the agreement will be resolved through 'mediation, arbitration, or through courts'. The term 'or' should be considered. There is a clear choice present in the agreement, and the plaintiff was not precluded from instituting action in this court. I am of the view that according to the agreement, the intention of the arbitration clause is that a dispute can be resolved in three different forums, namely; through mediation, through arbitration, or through the court system. The plaintiff made its election.

[12] In light of the foregoing, the special plea is dismissed and the following order is made:

1. The special plea is dismissed.

² *De Witt v Overo Investments CC* (HC-MD-CIV-ACT-CON-2020/5121) [2022] NAHCMD 243 (13 May 2022).

2. There shall be no order as to costs.
3. The matter is postponed to 13 March 2023 at 15:30 for a Status hearing to enable the defendant to obtain legal representation.
4. The parties are directed to file a joint status report on or before 8 March 2023.

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| Judge's signature | Note to the parties: |
| | Not applicable. |
| Counsel: | |
| Plaintiff | Defendant |
| Mr N Enkali Of Kadhila Amoomo Legal Practitioners, Windhoek | In person |