REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: LC 73/2016

In the matter between:

NAMIBIA WILDLIFE RESORTS (PTY) LTD **APPLICANT**

And

INGPLAN CONSULTING ENGINEERS AND PROJECT MANAGERS (NAMIBIA) (PTY) LTD **FIRST RESPONDENT**

GEORGE COLEMAN N.O. **SECOND RESPONDENT**

Neutral citation: *Namibia Wildlife Resorts (Pty) Ltd v Ingplan Consulting Engineers and Project Managers (Namibia) (Pty) Ltd* (LC 73/2016) [2017] NALCMD 29 (19 September 2017)

Coram: UNENGU AJ
Heard: **04 April 2017**
Delivered: **19 September 2017**

Flynote: Contracts – arbitration clause – parties are bound by clause and clause remains severable after cancellation was effected – court has no jurisdiction to determine issue of validity and enforceability of arbitration agreement.

Summary: Applicant applied to this court seeking urgent *interim* relief, suspending arbitration proceedings, which was granted by this court. The applicant further sought in the ordinary course to have the arbitration agreement declared *void* for vagueness, alternatively invalid and unenforceable.

Held, parties are bound by the arbitration clause and that such clause is severable from the remaining agreement as cancelled by the applicant.

Held, court does not have jurisdiction to determine the issue of validity and enforceability of the arbitration agreement while the matter is pending before an arbitrator.

Held, matter is referred back to the arbitrator to determine the issue.

ORDER

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1. This court has no jurisdiction to adjudicate over the relief sought by the applicant under Part B hereof, and accordingly the application is dismissed.

2. The special plea of arbitration raised by the first respondent is hereby upheld.

3. The relief sought by the applicant in respect of Part B is accordingly referred back to the second respondent to adjudicate upon.

4. The *interim* interdict granted by the court on 29 April 2016 is hereby discharged.

5. The applicant is directed to pay the costs of the first respondent, including the costs of one instructed and one instructing counsel. These costs are to include the costs for the urgent application lodged by the applicant and the costs of this application.

RULING

UNENGU AJ:

Introduction

[1] The applicant lodged an application on the 27 April 2016, consisting of two parts, namely part A[1] and part B[2]. Part A was lodged seeking urgent *interim* relief, whereas part B thereof, sought relief in the ordinary course.

[2] Part A which relates to urgent *interim* relief sought against both respondents was granted on 29 April 2016, pending the finalization of the relief sought by the applicant under Part B thereof.

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[1] '1. Dispensing with the forms and service provided for in the rules of court and hearing his matter, to the extent that it relates to the relief sought in **Part A** hereof, as one of urgency;

2. Interdicting and restraining first and second respondent from taking any steps whatsoever for purposes of proceeding with, or advancing the arbitration proceedings between applicant and first respondent, held before the second respondent in his capacity as arbitrator in such proceedings, pending the ultimate and final outcome and determination of the relief sought by the applicant in **Part B** hereof;

3. Granting to the applicant such further and/or alternative relief as this Honourable Court may deem fit;

4. In the event that the relief sought in **Part A** hereof is opposed, directing the first and second respondent, jointly and severally, the one to pay the other to be absolved, to pay the costs of such relief sought in **Part A** hereof;

5. For purposes of the proceedings contemplated by **Part B** below, directing that such proceedings be determined in accordance with the Rules of Court and Practice Directives of the Namibian High Court.

[2] '6. Declaring the clause 9 set out in the Memorandum of Agreement annexed to the supporting affidavit of Sebulon Chicalu filed in support hereof as annexure "SC1":

6.1 to be null and void for vagueness; alternatively

6.2 to be void for lack of consensus between the applicant and first respondent on the content thereof; alternatively

6.3 to have been validly cancelled by the applicant on 14 April 2016

7. Declaring the arbitration proceedings instituted between applicant and first respondent, before the second respondent in his capacity as arbitrator, to be null and void *alternatively* validly terminated by the applicant on 14 April 2016;

8. Directing and ordering that any respondent opposing the relief sought under Part B be ordered, jointly and severally in the event that both the respondents oppose such relief, to pay the costs of this application;

9. Granting to applicant such further and/or alternative relief as this Honourable Court may deem fit.

[3] In principle therefore, the monster tearing the parties apart consists of the following legal components:

1. Whether this court has jurisdiction to adjudicate over the relief sought by the applicant in Part B.

2. Whether clause 9 of the agreement entered into by the parties is *void* for vagueness, alternatively, having been validly cancelled by the applicant on 14 April 2016.

3. If such clause is found to be *void* or, in the alternative, having been validly cancelled by the applicant, whether such arbitration proceedings having occurred between the parties are as a consequence invalid.

Background

[4] During the course of December 2012 and January 2013, the applicant and the first respondent entered into a Memorandum of Association (hereinafter referred to as the 'agreement'), in terms of which the first respondent was authorized to perform project management services on behalf of the applicant, at the Hardap Resort in the Hardap Region.

[5] There were numerous disputes which arose between the parties in respect of the performance of the mandate. As a consequence thereto, the applicant cancelled the agreement in August 2013, claiming that the first respondent had repudiated the agreement.

[6] Subsequently after the agreement was cancelled by the applicant, the first respondent relied on clause 9 of the agreement (arbitration clause) in order to resolve the dispute between the parties. In other words, the first respondent in terms of the agreement, sought that the matter be referred to arbitration, in which the applicant participated

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[7] In order to proceed with the arbitration proceedings, the arbitrator proposed that the Rules of Conduct of Arbitrations (6th Ed) to govern the arbitration proceedings, which was accepted by the parties, but never signed by the applicant to have effect. This fact is thus placed in issue.

[8] On 11 June 2015, the arbitrator listed certain preliminary issues the parties had to agree upon, such as liability for costs of venue, transcription, etc. before the arbitration proceedings could commence. A proposal was made by the first respondent that both it and the applicant should equally share such costs, which was met by a counter proposal by the applicant. Despite not agreeing on such procedural aspects, the first respondent forged ahead and the first arbitration session commenced in February 2016, whereafter the proceedings were postponed to 5 May 2016.

[9] On the 14 March 2016, the first respondent refused to provide further copies of the transcribed record to the applicant, unless it pays half of the costs thus far incurred by the first respondent. No such payment was effected by the applicant. On 7 April 2016, the first respondent's legal practitioner informed the applicant that they must pay the Hotel Safari the costs of attendance at the arbitration venue in respect of its representatives and witnesses, failing which, they (applicant) would not have access to the venue.

[10] In light of what transpired above, the applicant saw this as a repudiation of the arbitration clause by the first respondent, justifying its termination of the arbitration. Accordingly, the applicant terminated the arbitration agreement on 14 April 2016.

[11] It is now on this basis that the applicant felt the need to approach the court to seek redress.

Merits

[12] Essentially, the parties' case may be dealt with under three main issues, namely:

1. Court's jurisdiction;

2. Validity of arbitration clause; and
3. Validity of arbitration agreement.

If I find that the court has no jurisdiction to adjudicate over this matter, in relation to Part B of the relief sought by the applicant, the matter is disposed of and it would be superfluous to consider the two other aspects.

Special plea: lack of jurisdiction

Applicant's position

[13] Mr Barnard, counsel for the applicant, contends that the applicant always had the right to approach this court for the relief sought suspending the arbitration proceedings pending the finalization of the issue relating to the validity and/or enforceability of the arbitration clause and in the same breath that the court is accordingly also empowered to give an order on the validity and/or enforceability of the arbitration clause.

[14] Counsel supports his contention by citing South African authors and numerous decisions by the South African courts. In particular, he cites the case of *Hill v Bairstow*[3] and *Pretoria City Council v Blom and Another*[4], which cases present the views the parties in the current case have. In other words, the *Bairstow* case representing the first respondent's view and the *Blom* matter presenting the sentiments of the applicant's case.

[15] With all due respect to counsel, the facts of the *Blom* matter seem distinguishable from the present case in that such case dealt with the issue of whether the parties agreed to have the matter referred to arbitration, whereas in this case, the parties agreed to venture into the arbitration avenue in order to resolve its predicament. The issue here rests mainly on whether the procedure followed by the first respondent and the second respondent on how the arbitration proceeded was valid.

[3] 1915 WLD 135.
[4] 1966 (2) SA 139 (T).

[16] I find no hardship in agreeing with the applicant that it was entitled to approach the court seeking urgent *interim* relief as the parties' own arbitration clause allows same. Where doubt creeps in, is when the applicant alleges to be entitled not only to such urgent *interim* relief, but also on the pronouncement by this court that it has jurisdiction to adjudicate over the validity and enforcement of the arbitration agreement.

First Respondent's position

[17] Counsel for the first respondent, Mr Labuschagne on the other hand, argues that by virtue of their agreement in terms of clause 9, which is severable from the remainder of the agreement, the parties have subjected themselves to resolve any issue by means of arbitration which they should see through. By running to this court accordingly brings the court's jurisdiction into question, if not, the purpose of having such a clause would be defeated.

[18] Mr Labuschagne, presents a technical argument in respect of his submissions in that he starts off by alluding to clause 9, which states that the parties are bound to refer any dispute not resolved by them to arbitration. Further he adds that no matter whether the applicant contends that it has cancelled the agreement and accordingly clause 9 does not apply, clause 9.6 allows for severability from the remainder of the agreement and the applicant's argument in that respect is drained from holding substance.

[19] Counsel continues to argue that the parties have also accepted the Rules of Conduct of Arbitrations, particularly placing emphasis on Rule 12, but as alluded to earlier, the applicant seems to take issue with this as a fact and accordingly I will not waste time to dwell upon this aspect, as this aspect is in issue and in my view falls by the side.

Finding

[20] Clause 9 of the parties' agreement states the following:

'9.1 A dispute between the parties that cannot be resolved amicably between the parties within ten days of it arising, relating to any matter arising out of this agreement or the interpretation thereof, shall be referred to arbitration.

…

9.6 The "arbitration" clause in this agreement shall be severable from the rest of this agreement and therefore shall remain effective between the parties after this agreement has been terminated.

9.7 No clause in this agreement which refers to arbitration shall mean or be deemed to mean or interpreted to mean that either of the parties shall be precluded from obtaining interim relief on an urgent basis from a Court of competent jurisdiction pending the decision of the arbitrator.'[5]

[21] Firstly, clause 9 holds that when the parties have a dispute and such dispute cannot be resolved by the parties themselves, they **shall** refer it to arbitration. The use of the word 'shall' is peremptory and therefore indicative of the parties being bound to resolve the matter, not by litigation in the first instance, but by arbitration.

[22] Secondly, clause 9 states that no matter whether any of the parties terminate the agreement for whatever reason, the arbitration clause stands despite the termination.

[23] Lastly, clause 9 allows that any party may approach a competent court to seek urgent *interim* relief pending the decision of the arbitrator. In other words, there is nothing that prohibits the applicant from obtaining the relief it sought under Part A, however, such relief would be dependent on the outcome of the decision of the arbitrator in respect of the relief sought under Part B.

[24] In my view, this is not a complex matter requiring the interpretation of the clause. It is clear from the wording that the parties are bound by clause 9 and that it is severable from the agreement and stands, whether the applicant contends that the agreement has been validly cancelled. Further, it is common cause that any of the parties are entitled to seek urgent *interim* relief from a competent court, which the

[5] Index of proceedings, p74 – 75 (only relevant sections alluded to).

applicant obtained in terms of Part A and accordingly no issue has or should be taken with that.

[25] If I concur with the applicant, I stand to ask myself the question: What the purpose of an arbitration clause is? Arbitration has prioritized the purpose to dispose of matters amicably with minimal formalities as otherwise found in courts of law and at the same time prevents every issue faced by parties to be litigated in a court of law, which assists not only in clearing or making the backlog of courts less, but assists parties to resolve their disputes faster and in the same breath makes resolution of disputes affordable.

[26] It stands therefore that I lean in favour of the first respondent's contentions and as such the issue of whether the agreement is void for vagueness or alternatively, invalid and unenforceable should be referred back to the arbitrator for consideration. Accordingly, this court does not have the jurisdiction to adjudicate upon the relief sought by the applicant in Part B.

Costs

[27] There is no reason for departing from the legal position that costs should follow the cause. Accordingly, I find that the applicant should pay the costs of the first respondent, including the costs of one instructing and one instructed counsel. These costs are to include the costs for the urgent application lodged by the applicant and the costs of this application.

Conclusion

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

1. This court has no jurisdiction to adjudicate over the relief sought by the applicant under Part B hereof, and accordingly the application is dismissed.

2. The special plea of arbitration raised by the first respondent is hereby upheld.

3. The relief sought by the applicant in respect of Part B is accordingly referred back to the second respondent to adjudicate upon.

4. The *interim* interdict granted by the court on 29 April 2016 is hereby discharged.

5. The applicant is directed to pay the costs of the first respondent, including the costs of one instructed and one instructing counsel. These costs are to include the costs for the urgent application lodged by the applicant and the costs of this application.

E P UNENGU

Acting Judge

APPEARANCES

APPLICANT:	TA Barnard Instructed by Mueller Legal Practitioners Windhoek
FIRST RESPONDENT:	EC Labuschagne (SC) Instructed by Fisher, Quarmby & Pfeifer Attorneys Windhoek
SECOND RESPONDENT:	No appearance