



**NOT REPORTABLE**

CASE NO: SA 55/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**NAMIBIA WILDLIFE RESORTS (PTY) LTD**

**Appellant**

and

**INGPLAN CONSULTING ENGINEERS & PROJECT  
MANAGERS (NAMIBIA) (PTY) LTD  
GEORGE COLEMAN N.O.**

**First Respondent**

**Second Respondent**

**Coram:** MAINGA JA, SMUTS JA and FRANK AJA

**Heard:** 25 June 2019

**Delivered:** 12 July 2019

**Summary:** This appeal arises from an application brought by the appellant, Namibia Wildlife Resorts (Pty) Ltd (NWR), in the High Court to put an end to a part heard arbitration between it and the respondent, Ingplan Consulting Engineers and Project Managers (Namibia) (Pty) Ltd (Ingplan). The parties had entered into an agreement (MoU) which contained an arbitration clause (clause 9), which the parties are entitled to invoke in cases of contractual disputes arising between them.

Contractual disputes arose between the parties and the parties sought to cancel the agreement after Ingplan had rendered its services. Ingplan invoked clause 9 and instituted arbitration proceedings against NWR and the dispute proceeded to arbitration. These proceedings were recorded and NWR was initially provided with

copies of transcripts, but was required to pay 50% of those costs and of the venue. NWR refused to do so. When Ingplan's legal practitioners advised that the consequences would be not receiving any further transcripts and no further access to the venue, NWR claimed that this conduct constituted a repudiation of the arbitration agreement and purported to cancel it.

NWR launched an application in the High Court seeking an urgent interim relief in part A of the notice of motion interdicting Ingplan and the arbitrator from proceeding with the arbitration, pending the final outcome of the relief sought in part B. Part B of the application sought to declare clause 9 to be void for vagueness, alternatively void for lack of consensus or to have been validly cancelled by NWR. It also sought to declare the arbitration proceedings to be null and void. The issue in part A was disposed of as Ingplan agreed to the terms of the interim order. The matter proceeded to a hearing in respect of part B. Ingplan opposed the claim in part B by raising a special plea of arbitration, contending that those issues would be determined by the arbitrator. The court *a quo* upheld Ingplan's defence and dismissed the application with costs, ruling that it did not have jurisdiction to determine the relief sought in part B.

On appeal, NWR appealed against the decision of the court *a quo* - and for the first time raised a point that by agreeing to the terms of the interim order, Ingplan agreed to the jurisdiction of the court *a quo*.

The court *a quo* held that the parties were bound by clause 9 to refer their disputes to arbitration. That was the means the parties chose to resolve disputes and not by litigation. That, the court found, was the clear intention of the parties – even where cancellation of the overall agreement has occurred. The issues raised in part B were thus matters for the arbitrator to determine and the court found that it did not have jurisdiction to do so and upheld the special plea of arbitration and dismissed the application for the relief in part B and discharged the rule relating to interim relief.

NWR's argument that the arbitration rule 12 (which empowers the arbitrator to decide a dispute regarding the existence, validity or interpretation of the arbitration agreement) could not without being authorised by clause 9 apply to it by virtue of

the non-variation clause in the MoU. This court found that argument to be untenable and without merit.

Ingplan correctly submitted that NWR cannot bank a 'validity point' and await the finalisation of proceedings only to raise it later. NWR should have raised these issues before the arbitrator at the outset (particularly in view of rule 12).

There is no proper basis raised to interfere with the court *a quo*'s dismissal of the application on the basis of upholding the special plea of arbitration except for the finding as to having no jurisdiction contained in the first order which is incorrect and the court *a quo*'s order to that effect is to be corrected by removing paragraph 1.

*It is held that*, NWR acquiesced to the jurisdiction of the arbitration proceedings to determine the dispute between the parties.

*It is held that*, the court *a quo* correctly upheld the special plea of arbitration.

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## APPEAL JUDGMENT

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SMUTS JA (MAINGA JA and FRANK AJA concurring):

[1] This appeal arises from an application brought by the appellant, Namibia Wildlife Resorts (Pty) Ltd (NWR), in the High Court to put an end to a part heard arbitration between it and the respondent, Ingplan Consulting Engineers and Project Managers (Namibia) (Pty) Ltd (Ingplan).

### Background

[2] The application in the High Court arose in the following way. NWR and Ingplan entered into an agreement styled a 'memorandum of understanding'

(MoU) in terms of which Ingplan would act as project manager in the renovation of NWR's resort at Hardap.

[3] The MoU contained an arbitration clause entitled 'dispute resolution' which provided:

'9. Dispute resolution

- 9.1 A dispute between the parties that cannot be resolved amicably between the parties within 10 days of its arising, relating to any matter arising out of this agreement or the interpretation thereof, shall be referred to arbitration.
- 9.2 When arbitration proceedings are held it shall not be necessary to observe or carry out the usual formalities of procedure (eg there shall not be pleadings or discovery or in accordance with the strict rules of evidence.
- 9.3 Arbitration shall be held as soon as possible and with a view to it being completed within 60 (thirty) (*sic*) calendar days after it is demanded.
- 9.4 Arbitrator for such proceedings shall be a suitably qualified person agreed upon the parties and, failing agreement within 7 days of, nominated by the President of the Law Society of Namibia.
- 9.5 The decision of the arbitrator shall be final and binding on the parties, who shall similarly carry out that decision and either of the parties shall be entitled to have the decision made an order of any Court with competent jurisdiction.
- 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 interpret 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.'

[4] Contractual disputes arose between the parties. Both NWR and Ingplan sought to cancel the agreement after Ingplan had rendered its services. Ingplan invoked clause 9 and instituted arbitration proceedings against NWR and the dispute proceeded to arbitration. After exchanging pleadings, a hearing lasting two weeks proceeded in February 2016. During that time Ingplan presented and closed its case. The arbitration proceedings were postponed at NWR's instance to 5 May 2016 for NWR to present its evidence and establish its counterclaim.

[5] The proceedings were recorded and NWR was initially provided with copies of transcripts, but was required to pay 50% of those costs and of the venue. NWR refused to do so. When Ingplan's legal practitioners advised that the consequences would be not receiving any further transcripts and no further access to the venue, NWR claimed that this conduct constituted a repudiation of the arbitration agreement and purported to cancel it.

[6] NWR thereafter launched its High Court application, seeking urgent interim relief in part A of the notice of motion, to interdict Ingplan and the arbitrator from proceeding with the arbitration, pending the final outcome of the relief sought in part B.

[7] Part B of the application sought to declare clause 9 to be void for vagueness alternatively void for lack of consensus or to have been validly

cancelled by NWR. Part B also sought to declare the arbitration proceedings to be null and void.

[8] The arbitrator was cited as a party but has not entered the fray. The application was launched on a very short notice to Ingplan (on 27 April to be heard on 29 April 2017). Ingplan agreed to the terms of an interim order which disposed of any need for the application for an interim interdict as a matter of urgency and the parties agreed that the matter would proceed to a hearing in respect of part B on an expedited basis.

[9] In opposing part B, Ingplan squarely raised the lack of jurisdiction of the High Court to determine the issue, contending that those issues would be determined by the arbitrator.

[10] The High Court upheld that defence and dismissed the application with costs, ruling that it did not have jurisdiction to determine the relief sought in part B. NWR appeals against its decision. In addition to the argument raised in the High Court in support of the relief set out in part B, NWR also raises on appeal – for the first time as was confirmed in oral argument – that by agreeing to the terms of the interim order, Ingplan agreed to the jurisdiction of the High Court. Before dealing with the parties' submissions, further background facts relevant to the issues raised in part B are first referred to.

#### Relevant facts

[11] The parties in late 2014 agreed upon the appointment of the second respondent, a practising advocate, as arbitrator. On 12 January 2015 Ingplan's

practitioner proposed a detailed schedule for the exchange of pleadings and discovery on 30 January 2015. Ingplan's legal practitioner proposed that the use of the Rules of Conduct of Arbitration (6<sup>th</sup> edition) (Arbitration Rules) should govern the proceedings and NWR's legal practitioner on the same day accepted that proposal.

[12] Ingplan filed its statement of claim and on 24 March 2015 NWR applied for condonation for the late filing of its statement of defence and counterclaim.

[13] On 11 June 2015, the arbitrator sought clarity from the parties on issues relating to the conduct of the arbitration such as an appeal, witness statements, discovered documents, his fees, the venue and dates.

[14] On 31 July 2015, Ingplan's legal practitioner proposed a 50:50 split on the costs of transcription and the venue, subject to the right to recover those costs in terms of an award. NWR's legal practitioner reverted with a counterproposal on 12 August 2015 which was not accepted.

[15] The arbitration hearing commenced on 1 February 2016 and ran for some two weeks until Ingplan closed its case. NWR sought and was granted a postponement to 5 May 2016 on the grounds of certain of its witnesses not being available.

[16] On 14 March 2016, Ingplan's legal practitioner declined to provide further copies of transcripts of the record to NWR until 50% of those costs had been paid. NWR's legal practitioner made out a cheque to the transcribers, rather than to

Ingplan which had effected payment for the transcripts, indicating that he would recall the cheque and reissue a cheque in the name of Ingplan's legal practitioners. But despite this, he refused to make such payment and instead asked the transcribers to release the record to him. The refusal to provide further transcripts was shortly afterwards raised by NWR as a repudiation of clause 9.

[17] On 7 April 2016, Ingplan's legal practitioners' claimed 50% of the venue costs, and threatened, failing which NWR and its witnesses would not have access to the venue upon resumption of the hearing on 5 May 2016. NWR's response was that this constituted a separate repudiation of the arbitration agreement and terminated it on 14 April 2016. NWR thereafter launched its application on 27 April 2016.

#### Approach of the High Court

[18] The High Court held that the parties were bound by clause 9 to refer disputes to arbitration. That was the means the parties chose to resolve disputes and not by litigation. That, the court found, was the clear intention of the parties – even where cancellation of the overall agreement has occurred. The issues raised in part B were thus matters for the arbitrator to determine and the court found that it did not have jurisdiction to do so and upheld the special plea of arbitration and dismissed the application for the relief in part B and discharged the rule relating to interim relief.

#### Parties' submissions

[19] Mr T. Barnard, who appeared for the NWR, argued that rule 12 of the Arbitration Rules agreed upon by the parties and which provided that an arbitrator



may decide any dispute regarding the existence, validity or interpretation of the arbitration agreement could not avail Ingplan. This was because there was no such term within clause 9 of the agreement and the non-variation clause in the agreement precluded any attempt to incorporate such a term. He further argued that where the authority of the arbitrator was impugned, he could not adjudicate that issue and that it was for the High Court to determine the validity of the arbitration clause.

[20] Mr Barnard also argued that the High Court retained jurisdiction to determine the validity of an arbitration clause. He referred to *Sherwood 1130 Investments CC v Robridge Construction CC and another*<sup>1</sup> and *Inter-Continental Finance and hearing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and another*<sup>2</sup> in support of his contention.

[21] Mr Barnard also contended that by agreeing to an order as to interim relief, Ingplan also agreed that the final relief would be adjudicated upon by the High Court. This contention was unsurprisingly not advanced in the High Court. Mr Barnard further submitted that it was not appropriate for this court to determine the other issues raised in part B as the High Court had not determined those issues, referring to this court's reluctance to consider matters as of first instance.

[22] Mr Labuschagne SC, who appeared for Ingplan, argued that the High Court had correctly found that the relief sought in part B was subject to arbitration and should be heard by the arbitrator. The parties having agreed to arbitration in clause 9, he argued that a hearing before the High Court of a dispute that could

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<sup>1</sup> 2001 (4) SA 741 (W).

<sup>2</sup> 1979 (3) SA 740 (W).

have been arbitrated, effectively defeats the purpose of judicial case management and its objectives. He stressed the severability of the agreement to arbitrate embodied in clause 9.6.

[23] Mr Labuschagne also argued that the parties had agreed that the Arbitration Rules govern the arbitration. In terms of rule 12.1, the arbitrator may rule on his or her jurisdiction to act. He submitted that the special plea of arbitration raised in defence to part B of the application was correctly upheld by the High Court.

[24] Mr Labuschagne further argued that the High Court was also correct for dismissing part B on other grounds. The lack of authority by NWR's legal practitioner to enter into informal agreements concerning applicable rules, the venue and fees of the arbitrator contended for NWR was without merit as was the contention that agreeing to such items conflicted with the non-variation clause in the contract. He submitted that NWR's denial of having in writing agreed to the Rules was also without merit.

[25] The attempt to strike down the arbitration agreement as being void for vagueness was also contended to be devoid of any basis whatsoever. Mr Labuschagne also submitted that the repudiation of clause 9 sought by NWR after being required to share in the costs of transcripts and venue was equally baseless.

#### Applicable principles

[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<sup>3</sup>).

[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.’<sup>4</sup>

[28] As was also said by Ngcobo J for the South African Constitutional Court in *Barkhuizen v Napier*<sup>5</sup> and approved by this court:<sup>6</sup>

‘*Pacta sunt servanda (sic)* is a profoundly moral principle, on which the coherence of society relies.’

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<sup>3</sup> Act 42 of 1965.

<sup>4</sup> *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others* 2009 (2) NR 596 (SC) at para 28.

<sup>5</sup> 2007 (5) SA 323 (CC) at para 87.

<sup>6</sup> *Old Mutual Life Assurance Company (Namibia) Ltd v Symington* 2010 (1) NR 239 (SC) at para 26.

[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.

[30] NWR raises a point that arbitration rule 12 which empowers the arbitrator to decide a dispute regarding the existence, validity or interpretation of the arbitration agreement could not, without being authorised by clause 9, apply to it by virtue of the non-variation clause of the MoU. Arbitration rule 12 provides:

'12.1 The Arbitrator may decide any dispute regarding the existence, validity, or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act;

...

12.4 For the purposes of this Rule an arbitration clause which forms part of a contract shall be regarded as an agreement independent of the other terms of the contract. A decision by the Arbitrator that the contract is null and void shall not of itself result in invalid of the arbitration clause.'

[31] This argument on behalf of NWR is not only untenable but entirely without substance. Clause 9 expressly provides that any dispute not capable of being resolved amicably is to be referred to arbitration. It overlooks clause 9.6 which makes it clear that the arbitration clause is severable from the rest of the agreement and to remain effective even if the MoU is terminated. Being severable, it is not subject to the non-variation clause once the MoU was terminated. But the non-variation clause would in any event not arise. Agreeing to Rule 12 does not vary the terms of the arbitration agreement. The variation now contended for by Mr Barnard is between clause 9.2 with its internally conflicting term of 30 and 60 day

periods referred to for the finalisation of the agreement and the Arbitration Rules which would mean those periods would not be complied with. But this point taking is entirely untenable in the context of NWR's instructing legal practitioner making it clear that the time periods in clause 9.3 should be regarded as *pro non scripto* and elected not to raise those periods when applying for condonation to the arbitrator for the late filing of NWR's statement of defence and counterclaim. The parties agreed that Arbitration Rules would regulate their arbitration and thus give effect to that agreement pursuant to their obligation 'to co-operate and to do whatever is necessary to facilitate and finalise the settlement of a dispute by way of arbitration' pursuant to their agreement to arbitrate and subject to the Act.<sup>7</sup> This point is demonstrably without merit and contrived. It follows that the special plea of arbitration was correctly upheld by the High Court.

[32] Mr Barnard made much of the finding by the High Court that it lacks jurisdiction and contended that the High Court retains its jurisdiction to determine a valid referral to arbitration. This submission is correct. An agreement to arbitrate would not deprive the High Court of jurisdiction in respect of a dispute, particularly when it relates to the validity of a referral. Whilst an agreement to arbitrate would not be an automatic bar to court proceedings, as the High Court understood matters, a respondent facing such proceedings may raise a special plea of arbitration, as was raised by Ingplan to part B of the application. It was rightly upheld. But this did not mean that the court would have no jurisdiction but rather that it correctly declined it, given the agreement to arbitrate and arbitration rule 12.

[33] The circumstances of this matter more than bear out that approach. The parties unequivocally agreed to arbitrate in clause 9. After an arbitrator was

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<sup>7</sup> As per Navsa, J in *Sherwood* at p 747 A-C.

designated, they exchanged pleadings, conducted pre-arbitration activities such as discovery and the like, agreed on the Arbitration Rules and proceeded with the arbitration hearing for some two weeks and after Ingplan closed its case, NWR sought and was granted a postponement owing to the unavailability of witnesses. At no prior stage did NWR squarely challenge the validity of the referral.

[34] As Mr Labuschagne rightly submitted, it was not open to NWR to bank its 'validity point' and await the finalisation of proceedings only to raise it then. It was open to NWR to raise those issues before the arbitrator at the very outset, particularly in view of rule 12. Plainly on the facts of this matter, NWR had by its participation acquiesced to the jurisdiction of the arbitration proceedings to determine the disputes between the parties. No proper basis has been raised to interfere with the High Court's dismissal of the application on the basis of the upholding of the special plea of arbitration. The finding as to having no jurisdiction, reflected in the first order, is however incorrect and the High Court order to that effect is to be corrected by removing paragraph 1.

[35] Mr Barnard also argued that Ingplan's assent to the interim order amounted to an agreement that the relief sought in part B could be adjudicated by the High Court. The terms of the interim order make absolutely no mention of this at all. Nor can it be implied in any way. This point is also without merit.

[36] Although this court received and heard argument on the other points raised in part B, we decline to be further drawn on those points as they would serve, if persisted with, before the arbitrator.

[37] Despite the contrived and meritless point taking on the part of NWR, Ingplan has not sought a special order as to costs. It would follow that costs on a party-party scale are to be awarded but should include the costs of one instructed and one instructing counsel.

[38] The following order is made:

1. The appeal is dismissed with costs, including the costs of one instructed and one instructing counsel.
2. The order of the High Court is varied by the removal of paragraph 1 and the renumbering of the remaining paragraphs 2 to 5 to 1 to 4 respectively.

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**SMUTS JA**

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**MAINGA JA**

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**FRANK AJA**

## APPEARANCES

APPELLANT:

T A Barnard

Instructed by Mueller Legal  
Practitioners, Windhoek

FIRST RESPONDENT:

E C Labuschagne, SC

Instructed by Fisher, Quarmby &  
Pfeifer, Windhoek