REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING ON SPECIAL PLEAS

Case No: **HC-MD-CIV-ACT- CON-2019/03067**

In the matter between:

NAMIBIA POWER CORPORATION (PTY) LTD Plaintiff

and

CONGO NAMIBIA PTY LTD Defendant

Neutral Citation: *Namibia Power Corporation (Pty) Ltd v Congo Namibia Pty Ltd* (HC-MD-CIV-ACT- CON-2019/03067) [2021] NAHCMD 210 (5 May 2021)

CORAM: PRINSLOO J
Heard: **14 April 2021**
Delivered: **5 May 2021**

Flynote: Special plea – Defendant raising defence that action should be stayed, pending determination of dispute by arbitrator in terms of arbitration clause – Onus and jurisdictional facts required to be proved discussed – *In casu* defendant failed to prove facts underlying special plea.

Special plea – Defendant raising defence of legality of agreement – validity of contracts entered into in violation of statutory enactments – whether courts can give effect to such contracts.

Summary: The plaintiff claims that the defendant is indebted to it in the amount of N$ 11 118 409 for electricity supplied by the plaintiff to the defendant during the period January 2017 to June 2019 plus interest and costs. The plaintiff supplied electricity to the defendant in terms of a written power supply agreement between the parties. By way of an amendment, the plaintiff has also instituted an alternative claim premised on unjust enrichment. The defendant raised a special plea of arbitration and illegality of the written agreement to the claim of the plaintiff.

Held that the defendant, when confronted with the plaintiff's contractual claim emanating from a contract containing a proper arbitration clause, had two options, i.e. to either file a dilatory plea in terms of the Rules of Court or to apply for a stay of the proceedings in terms s 6 of the Arbitration Act.

Held that the arbitration clause as per para 25 of the agreement embedded in the agreement itself and is therefore linked to the validity of the rest of the agreement. There is no provision in the agreement for the severability to the arbitration clause, which would allow the said provision to remain effective regardless of the validity of the remainder of the contract.

*Held tha*t the defendant clearly disassociates itself from the agreement, which was allegedly entered into without consent by the defendant and which the defendant regarded as not binding on it. On this mere fact pleaded by the defendant, the matter cannot go to arbitration, regardless of whether the court finds the agreement to be void.

Held further that the issue does not lie in whether the plaintiff was licenced to supply electricity to the defendant; it lies in the fact that the defendant on its own papers is not licenced as a distributor of electricity in terms of the Act.

Held that the agreement between the parties is in respect of a legal purpose and that the plaintiff was entitled to supply electricity to the defendant and charge for the consumption. Court not satisfied that the special plea regarding the alleged violation of section 17 (1) (e) of the Act passes muster.

Accordingly plaintiffs claim dismissed with costs.

ORDER

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1. The special pleas are dismissed with costs.

2. Such costs to include the cost of one instructing and one instructed counsel.

Further conduct of the matter:

3. The matter is postponed until **26/05/2021** at **08:30** for Pre-trial conference (on the merits of the matter).

4. In the event that the Parties wish to amend the pre-trial order, then the amended proposed pre-trial order must be filed on or before 19 May 2021.

5. The counsel who will be engaged in the trial must prepare and attend the pre-trial conference, where possible, alternatively the legal practitioner seized with the matter.

JUDGMENT

PRINSLOO J,

Introduction

[1] The plaintiff is the national power utility company duly registered and incorporated in terms of the applicable laws of the Republic of Namibia and is

licenced under s 18 of the Electricity Act 2 of 2000 and by virtue of s 46(3) of Act 4 of 2007 to supply electricity to consumers.

[2] The defendant is a company registered and duly incorporated in terms of the applicable laws in Namibia.

[3] The plaintiff claims that the defendant is indebted to the plaintiff in the amount of N$ 11 118 409 for electricity supplied by the plaintiff to the defendant during the period January 2017 to June 2019 plus interest and costs. The plaintiff supplied electricity to the defendant in terms of a written power supply agreement between the parties. By way of an amendment, the plaintiff has also instituted an alternative claim premised on unjust enrichment.

[4] The defendant raised a special plea to the claim of the plaintiff in the following terms:

'**TAKE NOTICE THAT** the Defendant pleads as follows to the plaintiff's amended particulars of claim:

SPECIAL PLEA: ARBITRATION

1. The Plaintiff, in pursuance of its purported claim, relies on a written power supply agreement (annexed to its particulars of claim as annexure "B"), which in terms of clause 25 of the Conditions of Supply of Electricity to Congo Namibia Trading Namibia Pty Limited (which constitute part of the written power supply agreement and annexed to the aforesaid power supply agreement as annexure "A") provides that: "In the event of a dispute between the parties concerning construction, interpretation or meaning or effect of the Power Supply Agreement, or as the rights, obligations or liabilities of any party thereto or as to the adjustment of any matter or thing to be agreed to or to be adjusted thereunder, or the observance or non-observance of any of the provisions of the Power Supply Agreement, the parties agree to refer the 2 dispute to arbitration under the arbitration laws in force in Namibia at that time, and each party shall within 30 days of such dispute arising, appoint an arbitrator and the arbitrators so appointed shall appoint a third arbitrator by consensus within 15 days of the appointment of the last arbitrator."

2. The Plaintiff has not referred the dispute to arbitration as contemplated in clause 25 of the Conditions of Supply of Electricity to Congo Namibia Trading Namibia Pty Limited.

3. The Defendant prays that the plaintiff's action be dismissed, alternatively be stayed, with costs, pending the final determination of the dispute by arbitration in terms of the written agreement.'

SPECIAL PLEA: AGREEMENT IN VIOLATION OF SECTION 17(1)(E) OF THE ELECTRICITY ACT, ACT 4 OF 2007

4. The written power supply agreement (annexed to plaintiff's particulars of claim as annexure "B") is an agreement in terms of which the plaintiff supplies electricity to the defendant for the defendant to distribute to its customers or other persons or entities.

5. The defendant is not in possession of a distribution license as contemplated in section 17(1) (e) of the Electricity Act, Act 4 of 2007.

6. The defendant is therefore barred from distributing, at the risk of criminal sanctions, electricity supplied by the plaintiff, and therefore the written agreement is in contravention of the Electricity Act, Act 4 of 2007, and therefore invalid and of no force or effect."

[5] The parties requested that the court first adjudicate the issue of the two special pleas as the outcome thereof can be dispositive of the plaintiff's claim.

Arguments on behalf of the parties

[6] I will refer to the words 'submit' and 'argue' and their derivatives during my ruling and must be understood to encompass both the heads of arguments and the oral submissions made in court.

Argument on behalf of the defendant

[7] Mr Elago argued that the fundamental questions that need adjudicating are: a) whether it is competent for any of the parties to ignore how they agreed to resolve the matter if a dispute arises, i.e. arbitration and b) whether an action can be based on an agreement which is contrary to a statute is void or voidable.

i. Arbitration

[8] Mr Elago argued that the plaintiff, in pursuance of its claim, relies on a written power supply agreement, which in terms of clause 25 of the Conditions of Supply of Electricity provides the following:

'25. **Arbitration/Dispute resolution**

25.1 In the event of a dispute between the parties concerning construction, interpretation or meaning or effect of the Power Supply Agreement, or as the rights, obligations or liabilities of any party thereto or as to the adjustment of any matter or thing to be agreed to or to be adjusted thereunder, or the observance or non-observance of any of the provisions of the Power Supply Agreement, the parties agree to refer the dispute to arbitration under the arbitration laws in force in Namibia at that time, and each party shall within 30 days of such dispute arising, appoint an arbitrator and the arbitrators so appointed shall appoint a third arbitrator by consensus within 15 days of the appointment of the last arbitrator.'

[9] Mr Elago argues that the plaintiff's election not to refer the matter to arbitration violates the agreement. In this regard, the court was referred to *NWR (Pty) Ltd v Ingplan Consulting Engineers and Project Managers Pty Ltd and Another*[1] where the court stated at para 27 that:

'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.'

[10] Mr Elago further referred me to an earlier judgment of the Supreme Court, *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others*[2] wherein the court held:

' . . (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.'

[11] The position of the defendant is thus that the arbitration clause must be enforced. Mr Elago argued that for this court not to uphold the special plea raised will result in the violation of the *pacta sunt servanda* principle, which must be upheld.

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[1] *NWR (Pty) Ltd v Ingplan Consulting Engineers and Project Managers Pty Ltd and another* (SA-2017/55) [2019] NASC 584 (12 July 2019).

[2] *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others* 2009 (2) NR 596 (SC) at para 28.

ii. Agreement in violation of a statute

[12] Mr Elago argued that the agreement on which the plaintiff's amended particulars of claim is premised stems from a written power supply agreement concluded between the parties in 2013. Counsel argued that the written power supply agreement is an agreement in which the plaintiff supplies electricity to the defendant to distribute to its customers or other persons or entities. However, the defendant is not in possession of a distribution license as contemplated in section 17(1) (e) of the Electricity Act, Act 4 of 2007.

[13] As a result, the defendant is barred from distributing electricity, at the risk of criminal sanctions, electricity supplied by the plaintiff, and therefore, so counsel argued, the written agreement is in contravention of the Electricity Act, Act 4 of 2007, and therefore invalid and of no force or effect.

[14] Mr Elago referred to several authorities dealing with contracts that conflict or in non-compliance with provisions of a statute. Counsel submitted that the common law maxim *ex turpi causa non oritur actio* applies to the current facts and refers to *Moolman v Jeandre Development CC*[3] wherein the court followed the matters of *Ferrari v Ruch*[4] and *Schweiger v Muller*[5] and wherein the court found that the *ex turpi cause* principle is absolute and admits no exception.

[15] Mr Elago also referred to *Kondjeni Nkandi Architects v The Namibian Airports Company Limited*[6] wherein Masuku AJ (as he then was) found that if a court was to give effect to a contract concluded in violation of a piece of legislation, then the court would be seeking to facilitate or encourage the very act or conduct that parliament saw fit to proscribe and render a criminal offence[7]

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[3] *Moolman v Jeandre Development CC* (SA 50-2013) [2015] NASC (3 December 2015) at para 75.

[4] *Ferrari v Ruch* 1994 NR 287 (SC).

[5] *Schweiger v Muller* 2012 (1) NR 87 (SC).

[6] *Kondjeni Nkandi Architects v The Namibian Airports Company Limited* (I 3622-2014) [2015] NAHCMD 223 (11 September 2015).

[7] Supra at para 40 of the judgment.

[16] Mr Elago submitted that if the principles set out in the relevant case law are applied to the instant matter, then the reliance of the plaintiff on the contract supplying electricity to an unlicensed undertaking contrary to s 17(1)(e) of the Electricity Act, causes the agreement to be void. Accordingly, the action cannot succeed on that basis.

[17] Mr Elago submitted that the special pleas raised by the defendant must succeed with costs.

Argument on behalf of the plaintiff

iii. Alleged void agreement

[18] Mr Chibwana submitted that the particulars of claim raised two alternative claims. Firstly a claim for payment premised on the existence of a legal and binding agreement, and secondly, a claim for unjust enrichment premised on the lack of a lawful agreement. Accordingly, Mr Chibwana submitted that the arbitration point only finds application to the first claim premised on the existence of a legal and binding agreement and not to the second claim, which is not premised on the presence of a lawful agreement.

[19] Mr Chibwana argued that the defendant is relying upon section 17 (1) (e)[8] of the Act to avoid liability by contending that the agreement between the parties is illegal. Mr Chibwana contended that the defendant seeks to benefit from its own wrong in violation of the prevention rule.

[20] Mr Chibwana submitted that the appropriate interpretation of section 17(1) (e) is that there is an obligation imposed upon a party that seeks to distribute electricity to secure a license. That duty to obtain a license is a duty that relates specifically to the defendant and not the plaintiff. The illegality relied upon by the defendant is an illegality that relates only to the defendant arising from its own omission. Mr Chibwana submitted that the said provision relates to the person who seeks to

[8] Duty to obtain a licence " (1) Despite any law to the contrary and subject to this Act, no person may establish or carry on any undertaking for –

(e) the distribution of electricity; unless such person holds a licence issued under this Act that authorises the particular activity."

distribute electricity and the illegality and criminality relates to the failure of that person, i.e. the defendant, to secure a distribution license.

[21] Mr Chibwana contended that the plaintiff entered into an agreement to supply electricity to a customer, i.e. the defendant and that the plaintiff is entitled to do so and acts lawfully when it supplies electricity to a customer. Mr Chibwana further contended that the plaintiff is licenced with the Electricity Control Board and was issued a Transmission licence to supply to customers, including the supply of electricity to the Kombat Substation. The plaintiff is further empowered to transmit and supply within the CENORED area. Thus, the plaintiff is not in violation of section 17 (1) (e) of the Act.

[22] Mr Chibwana further submitted that even if the court upheld the defendant's argument, then the legal point should still fail on the basis that the general principle that would find application in respect of illegal agreements would not apply because the present scenario falls within the exceptions to the general principle. In this regard, the court was referred to the *Ferrari* matter[9] wherein the court relaxed the maxim in *pari delicto potior est conditio defendentis* in order to do "simple justice between man and man."

[22] Mr Chibwana further submitted that our Supreme Court in *Schweiger*[10] considered the approach to the relaxation of the rule where such relaxation would have an indirect effect on enforcing the illegal agreement wherein the court succinctly summarised the approach that should be adopted to this issue and held as follows:

'[28] In applying the above principles to the present matter, it is my view that whereas the *par delictum* rule should be relaxed to allow the plaintiff to recover the DM40 000, the rule should not be relaxed to award interest to the plaintiff from the date on which the invalid agreement was entered into by the parties. This would have the effect of enforcing the illegal agreement.

[29] However, the value of money does decrease with inflation and the capital amount no longer has the same value as it did when the invalid agreement was entered into

[9] See footnote 4 supra.

[10] See footnote 5 supra.

by the parties. That notwithstanding, in the view I take of the matter, it would give effect to the principle of justice between individual and individual if both parties are to be put in the position they were in immediately prior to the conclusion of the illegal agreement and nothing more. Therefore, only the amount by which the appellant was actually enriched should be repaid.'

[23] In conclusion, Mr Chibwana argued that in the present circumstances, even if the agreement is illegal, the rule should be relaxed to allow the plaintiff to recover the actual cost of the electricity supplied by the plaintiff and which the defendant duly received and submitted that the special plea raised should be dismissed on this basis alone.

iv. Arbitration agreement

[24] Mr Chibwana submitted that the arbitration agreement would not survive a finding of invalidity. Counsel submitted that the defendant raises two mutually destructive positions; to an extent, the defendant approbates and reprobates. In this regard, the plaintiff relies on the decision of the court in *North West Provincial Government and Another v Tswaing Consulting CC and Others*[11] where reference was also made to *Heyman v Darwins Ltd*[12] and the court in that matter stated as follows:

'If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio...the arbitration clause cannot operate, for on this view the clause itself is also void.'

[25] Mr Chibwana also drew this court's attention to the comments by the court in *Wayland v Everite Group Ltd*[13] wherein the court commented as follows:

'It seems to me to be eminently reasonable that a clause of a contract must stand or fall with the whole body of the contract and not be declared excisable by the parties or that

[11] *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 (4) SA 452 (SCA) at para 13.

[12] *Heyman v Darwins Ltd* [1942] 1 ALL ER 337(HL) at 343F.

[13] *Wayland v Everite Group Ltd* 1993 (3) SA 946 WLD at 951H-952C.

such declaration should have any validity merely on the ground that the parties having elected to say that the clause itself is severable from the contract....[in cases where a contract is] invalid and unenforceable....then the arbitration clause must in my view stand or fall with the validity of the main contract, notwithstanding any declaration by its signatories.... Nor can it be a matter simply for interpretation of the arbitration clause itself to determine whether it stands or falls with the invalidity or otherwise of the main contract... If therefore there is some justification for respondent's allegations of invalidity and unenforceability of the contract, then, the arbitration clause itself being in doubt and the consequent jurisdiction of the arbitrator to proceed under it doubtful, a reference to arbitration would in my view be an improper reference.'

[26] Mr Chibwana, therefore, submitted that in the event the special plea premised on illegality is upheld and the agreement is found to be an illegal agreement, then the arbitration agreement captured by way of Clause 25 should fall away, and with it the special plea of arbitration would also fall away.

[27] On the question if the plaintiff could sue as opposed to proceeding to arbitration Mr Chibwana argued that in arriving at an interpretation to Clause 25 the plaintiff relies on the *classicus* decision on the interpretation of agreements by the Supreme Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors*[14], where the court set out the approach to be adopted, in relation to the interpretation of agreements when faced with an agreement.

[28] Mr Chibwana contended that the principles that apply in respect of arbitration provisions are trite. Counsel submitted that the alternative claim for unjust enrichment, being a claim premised on the lack of a binding agreement, would not be subject to arbitration and as such, the issue cannot be determined by arbitration and if the court finds that the agreement is invalid as contended by the defendant so is the arbitration clause.

[29] In addition to that Mr Chibwana argues that the defendant failed to comply with provisions of section 6 (1) and (2)[15] of the Arbitration Act No. 42 of 1965. Counsel submitted that the defendant should have instituted an application for stay

[14] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors* (SA 9/2013) [2015] NASC 10 (30 April 2015).

of the present proceedings as contemplated by section 6 (1) and (2) pending the finalisation of arbitration proceedings.

[30] Mr Chibwana argued that in the absence of compliance with section 6 of the Arbitration Act, the defendant is not entitled to raise a special plea. Mr Chibwana accepts that there are judgments that have held that a special plea may be raised for a stay of proceedings but submitted that those judgments have not taken into consideration the language utilized by the Legislature in section 6 insofar as the Arbitration Act requires the institution of an application and the considerations that must be applied in respect of that application.

[31] Those considerations are whether or not there is sufficient reason for the dispute not to be referred to arbitration in accordance with the agreement. Those considerations differ fundamentally with the approach to a special plea where the issue for consideration is whether or not the arbitration agreement finds application. Mr Chibwana, therefore, submitted that on a proper application of section 6 of the Arbitration Act, the special plea of arbitration has not been properly raised.

[32] Mr Chibwana submitted in conclusion that the special pleas should be dismissed with costs of one instructing and one instructed counsel.

Discussion

Arbitration

[33] Arbitration is one of the most common alternative dispute resolution mechanisms in which the parties voluntarily submit themselves to the arbitrator's

[15] 6. (1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.

(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

determination in terms of a dispute. Arbitration is the alternative to litigation as it can be made binding and final between the parties, should they agree to it.

[34] The defendant, when confronted with the plaintiff's contractual claim emanating from a contract containing a proper arbitration clause, had two options, i.e. to either file a dilatory plea in terms of the Rules of Court or to apply for a stay of the proceedings in terms s 6 of the Arbitration Act.

[35] 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.

[36] In the current matter, the defendant opted to file a dilatory plea instead of proceeding in terms of s 6 of the Arbitration Act.[16] The argument advanced by the plaintiff' that the defendant's failure to follow the proceedings in terms of the Arbitration Act will preclude or estop it from raising arbitration now.

[37] In *Aveng Africa t/a Grinaker-LTA v Midros Investments*[17] Wallis J stated as follows:

'[17] It is now well-established that an arbitration agreement does not oust the jurisdiction of the courts[18]. Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to s 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause. Whichever course it adopts the onus then rests on the claimant to persuade the court to exercise its discretion to refuse arbitration. This requires a very strong case to be made out[19].[13] If a stay is granted the only

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[16] Act 42 of 1965.

[17] *Aveng Africa t/a Grinaker-LTA v Midros Investments* 2011 (3) SA 631 (KZD).

[18] *The Rhodesian Railways Limited v Mackintosh* 1932 AD 359 at 375.

[19] *Rhodesian Railways v Mackintosh, supra,* 375; *Universiteit van Stellenbosch v A J Louw (Edms) Bpk, supra,* 333 F-H. *MV Iran Dastghayb: Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para [19]

recourse that the claimant then has in order to pursue the claim is to proceed by way of arbitration. But, if the commencement of legal proceedings constituted an abandonment of its right to arbitrate, the defendant could oppose the arbitration on that ground alone. That does not make sense and is clearly incorrect. If it were correct it would make a nonsense of the process of seeking, and the grounds for granting, a stay. The stay does not afford the defendant an absolute defence to the claim. Its purpose is to have the claim determined by the forum to which the parties have agreed to submit themselves. Nor can it matter in those circumstances how far the litigation has progressed. After all, if the question of arbitration is raised by way of a special plea rather than under s 6 of the Arbitration Act the litigation will proceed on all issues until the stage when the special plea is determined as a separate issue under Rule 33(4). If a stay is granted at that stage then the claimant is entitled to pursue its claim by way of arbitration[20].' (my underlining)

[38] It is clear from the Aveng matter 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. Granted, if the defendant followed the Arbitration Act instead of the common law, this matter could have been resolved as far back as 2019 already, however as the Arbitration Act did not oust the common law nothing precluded the defendant from conducting the litigation in the manner in which it chose to.

[39] It is common cause that the agreement contains an arbitration clause that reads as follows:

'25. **Arbitration/Dispute resolution**

25.1 In the event of a dispute between the parties concerning construction, interpretation or meaning or effect of the Power Supply Agreement, or as the rights, obligations or liabilities of any party thereto or as to the adjustment of any matter or thing to be agreed to or to be adjusted thereunder, or the observance or non-observance of any of the provisions of the Power Supply Agreement, the parties agree to refer the dispute to arbitration under the arbitration laws in force in Namibia at that time, and each party shall within 30 days of such dispute arising, appoint an arbitrator and the arbitrators so appointed shall appoint a third arbitrator by consensus within 15 days of the appointment of the last arbitrator.'

[40] The defendant's position is marred with ambiguity. On the one hand, the defendant pleads that the plaintiff's action be dismissed, alternatively be stayed, with

[20] Conceivably issues of prescription may then arise but it is unnecessary to determine those in these proceedings.

costs, pending the final determination of the dispute by arbitration in terms of the written agreement and on the other hand, the defendant pleaded that the written agreement between the parties is in contravention of the Electricity Act, Act 4 of 2007, and therefore invalid and of no force or effect. Then in its plea on the merits, the defendant denied that one Mr Andre Francois Neethling had the authority and consent of the defendant to enter into the said written agreement between the parties. Therefore the written agreement does not bind the defendant, and the plaintiff is put to the proof thereof.

[41] The question then arises, in light of its plea, if there was any consensus between the parties that in the event of any disputes between them which arise out of or in connection with the agreement and which cannot be resolved amicably between them must be referred to arbitration.

[42] This is literally a case where the defendant wants its cake and eats it as well. The positions that the defendant take is mutually destructive, and the reason is simple, the arbitration clause as per para 25 of the agreement embedded in the agreement itself and is therefore linked to the validity of the rest of the agreement. There is no provision in the agreement for the severability to the arbitration clause, which would allow the said provision to remain effective regardless of the validity of the remainder of the contract.

[43] The plaintiff referred the court to the matter of *North West Provincial Government and Another v Tswaing Consulting CC and Others*[21] which appears to be entirely apposite in the current matter, considering the plea of the defendant, wherein the court quoted from the speech of Viscount SIMON, L.O., in the English case of *Heyman v Darwins Ltd*[22] said:

> 'If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void

[21] 2007 (4) SA 452 (SCA) at para 13.

[22] *Heyman v Darwins Ltd*?. (1942, A.E.R. 337).

ab initio...the arbitration clause cannot operate, for on this view the clause itself is also void."[23]

[44] The defendant clearly disassociates itself from the agreement, which was allegedly entered into without consent by the defendant and which the defendant regarded as not binding on it. On this mere fact pleaded by the defendant, the matter cannot go to arbitration, regardless of whether the court finds the agreement to be void or not.

[45] The special plea of arbitration can therefore not succeed.

Legality of the agreement

[46] As indicated earlier, the defendant pleaded that it is not in possession of a distribution license as contemplated in section 17(1) (e) of the Electricity Act and that it is therefore barred from distributing, at the risk of criminal sanctions, electricity supplied by the plaintiff, and therefore the written agreement on which the plaintiff relies is in contravention of the Act and therefore invalid and of no force or effect.

[47] Section 17 of the Electricity Act, 2007 (Duty to obtain a licence) states that no person may establish or carry on generation, trading, transmission, distribution, supply, import or export of electricity without a licence. [24]

[48] In the current matter, the plaintiff pleaded that it is licenced in terms of section 18 of the Electricity Act 2 of 2000 and by virtue of section 46(3) of the Electricity Act 4 of 2007 to supply (amongst other) electricity to consumers.

[49] The preamble to the agreement provides as follows:

'NamPower agrees to supply the Customer and the Customer agrees to take from NamPower electricity to be used by the Customer on the premises described hereunder, subject to the following terms and conditions.'

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[23] Also applied by Ueitele J in *Radial Truss Industries (Pty) Ltd v Shipefi* (HC-MD-CIV-ACT-CON-2018/03205) [2020] NAHCMD 434 (16 September 2020). *; Scriven Bros v Rhodesia Hides & Produce Co & Others.*

[24] "distribution", in relation to electricity, means the conveyance of electricity by means of a distribution system, which consists wholly or mainly of medium and low voltage networks, to a customer;

[50] Supply in the current context is defined as “the delivery of electricity to a customer as a commodity”. The plaintiff pleaded that it did not distribute electricity to the defendant. Distribution in relation to electricity is defined as “the conveyance of electricity by means of a distribution system, which consists wholly or mainly of medium and low voltage networks, to a customer”.

[51] The issue does not lie in whether the plaintiff was licenced to supply electricity to the defendant; it lies in the fact that the defendant on its own papers is not licenced as a distributor of electricity in terms of the Act.

[52] The written power supply agreement on which the plaintiff bases its action dates back to May 2013. Since that date, the plaintiff supplied the defendant with electricity in terms of the agreement, and it would appear from the plaintiff's replication to the defendant's amended plea that the defendant has paid for the power supply from 2013 to December 2016. At no point during that period did the defendant indicate that the written power supply agreement is invalid or of no force because it does not hold a distribution licence.

[53] In terms of the power supply agreement between the parties, it was agreed that the plaintiff would supply power to the defendant at the supply point: Congo Namibia Trading and the defendant's notified maximum demands is 600 kVa[25].

[54] Due to the maximum demand of the defendant at 600 kVa the defendant was, as a distributor of electricity, required to have a licence in terms of s 17 of the Act. In terms of the Act any distributors of electricity with an estimated total demand of installation which is more than 500 kVa must have a licence. [26].

[55] The question is whether there is merit in the special plea of the defendant that the power supply agreement is void because the defendant did not have a licence to distribute such electricity in terms of the Act.

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[25] “kVA” means kilo-Volt Amperes.

[26] See s 18 of the Act.

[56] From my reading of the Act it does not appear to place an onus on the licensee, the plaintiff, to ensure that the customer, the defendant, has a licence to distribute. That obligation clearly rested on the defendant as section 17 clearly states that 'no person may establish or carry on any undertaking for –
(e) the distribution of electricity; unless such person holds a licence issued under this Act that authorises the particular activity'.

[57] It is not unlawful to supply the defendant with electricity; however, the defendant's distribution after that to its customers is in contravention of the Act as it is not done as a result of a licence issued in terms of s 17 of the Act.

[58] I find it interesting that the defendant is now relying on its own non-compliance to avoid liability in terms of the agreement between the parties. The defendant's level of liability, if any, will however be determined by the trial court.

[59] The defendant pleaded that the power supply contract between the parties is not in compliance with the provisions of the Act and that the common law maxim *ex turpi causa non oritur actio* applies. I, however, disagree with the defendant. I am of the considered view that the agreement between the parties is in respect of a legal purpose and that the plaintiff was entitled to supply electricity to the defendant and charge for the consumption. Therefore, I am not satisfied that the special plea regarding the alleged violation of section 17 (1) (e) of the Act passes muster.

[60] Mr Chibwana also pointed out to this court that even if the agreement was prohibited, the importance thereof is that the plaintiff supplied electricity to the defendant over many years, and therefore on the principles of unjustified enrichment, the plaintiff must have the right to pursue its claim, even if it is on the alternative.

[62] I agree with the plaintiff's counsel in this regard. Even if the plaintiff do not succeed with its contractual claim, it may still succeed with its alternative claim of unjustified enrichment.

Conclusion:

[63] As a result of my discussion above, I am of the considered view that the defendant cannot succeed in respect of either of its special pleas, and my order is therefore as follows:

1. The special pleas are dismissed with costs.
2. Such costs to include the cost of one instructing and one instructed counsel.

Further conduct of the matter:

3. The matter is postponed until **26/05/2021** at **08:30** for Pre-trial conference (on the merits of the matter).
4. In the event that the Parties wish to amend the pre-trial order, then the amended proposed pre-trial order must be filed on or before 19 May 2021.
5. The counsel who will be engaged in the trial must prepare and attend the pre-trial conference, where possible, alternatively the legal practitioner seized with the matter.

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JS PRINSLOO

Judge

APPEARANCES:

For the Plaintiff:	Adv. T Chibwana On instructions of Angula Co. Incorporated Windhoek
For Defendant:	PST Elago Tjombe- Elago Incorporated Windhoek