REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2020/02695

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**1ST PLAINTIFF**
MINISTER URBAN AND RURAL DEVELOPMENT	**2ND PLAINTIFF**

and

FERUSA CAPITAL FINANCING PARTNERS CC	**1ST DEFENDANT**
NELSON NDELIMOMO NAPEJE AKWENYE	**2ND DEFENDANT**
TOBIAS AKWENYE	**3RD DEFENDANT**

Neutral citation: *The Government of the Republic of Namibia v Ferusa Capital Financing Partners CC* (HC-MD-CIV-ACT-CON-2020/02695) [2022] NAHCMD 684 (13 December 2022)

Coram: RAKOW J
Heard: **17 November 2022**
Order: **8 November 2022**
Reasons: **13 December 2022**

Flynote: Arbitration – General rule that agreement must be honoured – Unless they are against public policy which would not arise in an agreement to arbitrate the kind in question – It however does not mean that the presence of arbitration clause means that the matter must be automatically stayed – Onus is on the respondent to

satisfy the court that it should not in its discretion refer the matter to arbitration – A court will only refuse to refer the matter to arbitration where a very strong case has been made out.

Summary: The first defendant in the matter was awarded a contract by the National Housing Enterprise (NHE) to construct 600 houses at Swakopmund. Without the consent of, NHE, the defendants entered into a sub-contracting agreement for the houses with an entity known as Dessert Paving and Construction CC and one known as New Era Investments (Pty) Ltd.

It was then complained that the first defendant frustrated the plaintiff's rights under this second agreement as it did not complete the houses as agreed and within the timelines as agreed. As the sub-contractors did not receive payment, they obtained a lien against the construction site in 2015, which is still in place and the plaintiff suffered loss.

The defendants raised a special plea, being that the contract contains an arbitration clause.

Held – that, plaintiffs' is relief is wider than just in terms of the agreement.

Held – that, the relief will fall outside the contract and cannot be determined by an arbitrator.

Held further –that, plaintiffs discharged the onus which rested on them to convince the court that the matter should not be referred to arbitration.

ORDER

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1. The application is dismissed with costs.
2. Such costs to include the costs of one instructing and one instructed counsel.
3 The parties are to file their joint pre-trial report in word format on or before 9/2/2023.
4 The case is postponed to 14/02/2023 at 15:30 for Pre Trial Conference hearing (Reason: Parties to file joint pre-trial conference report).

JUDGMENT

RAKOW J

Introduction

[1] The first plaintiff in the current matter is the Government of the Republic of Namibia, duly appointed in terms of the Constitution of the Republic of Namibia and represented by the Minister of Urban and Rural Development. The second plaintiff is also the Minister of Urban and Rural Development. The first defendant is Ferusa Capital Financing Partners CC, a closed corporation duly registered in accordance with the Close Corporation Act, 26 of 1988. The second defendant is Nelson Ndelimomo Napeje Akwenye, an adult male businessman who is also holding 50% shares in the first defendant. The third defendant is Tobias Akwenye, an adult male who owns the other 50% shares in the first defendant.

Background

[2] On 1 May 2014 the first defendant was awarded a contract by the National Housing Enterprise (NHE) to construct 600 houses at Swakopmund. The total value of the project amounted to N$165 666 540. It then seems that although explicitly prohibited without the consent of, NHE, the defendants entered into a sub-contracting agreement for the houses with an entity known as Dessert Paving and Construction CC and one known as New Era Investments (Pty) Ltd. It seems that during the period of construction, NHE and the first defendant ran into financial difficulties which resulted in various incidents of defaults wherein the first defendant gave notice to one or both sub-contractors to suspend their work.

[3] Between 7 September 2015 and 6 October 2015 NHE and the first defendant entered into a compromise which resulted in a new construction agreement being entered into under the Mass Housing Development Programme. This agreement replaced the previous agreement. This agreement had a number of expressed alternatively tacit terms.

[4] It was then complained that the first defendant frustrated the plaintiffs' rights under this second agreement as it did not complete the houses as agreed and within the timelines as agreed. As the sub-contractors did not receive payment, they obtained a lien against the construction site in 2015, which is still in place. The plaintiffs allegedly suffered a loss of N$ 87 637 510.19 which includes monies paid over to the defendants as well as professional fees and the costs of security. The plaintiffs further claims for damages done to the property as well as contractual penalties, escalation and for additional security to safeguard the houses in the amount of N$ 28 182 434.10.

Special plea

[5] The defendants raised a special plea, being that the contract contains an arbitration clause. They pleaded as follows:

'1.1 The building contract executed between the Plaintiff and the Defendants provides the following:

27.1 – if any dispute or difference shall arise between the Employer of the principal Agent on his behalf, and the Contractor, either during the progress of after the completion of the Works or after the determination of the employment of the contractor under this Agreement, 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.

27.2 – The said decision shall be final and binding on the parties, unless the Contractor or the Employer within fourteen (14) 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 (14) fourteen days after a written request to him by the Employer or the Contractor fails to five a decision as aforesaid, such dispute or difference shall be and is hereby referred to adjudication in accordance with the attached Rules of adjudication. The adjudicator shall be any person agreed by the parties or failing agreement appointed in accordance with the Rules.

27.3 – 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 fourteen (14) days of receipt of the decision or the expire of the time for the decision. If no 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.

27.4 – 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 I the Schedule.

27.5 – The Employer shall permit the Contractor to join with the Employer, in any dispute resolution procedure, any nominated or selected sub-contractor.

1,2. The Respondents (sic) plea is (that) the Plaintiff wholly disregarded the dispute resolution procedures by instituting action against the Defendants without resorting to the dispute resolution mechanism provided for and agreed to between the parties in terms of the agreement.

1.3 The Defendants accordingly plea that the claim be dismissed with costs, alternatively that the matter be referred to dispute resolution as envisaged and agreement in the contract.'

The Defendants' argument

[6] On behalf of the defendants it was argued that, the plaintiffs indicated in a point in *limine* that the special plea can only be established by presenting evidence in the trial and therefore deciding it on the merit. The defendants' position is that this is not the case as the court can decide on the special plea by assessing the pleadings in the case. Their argument is that the parties should have exhausted internal remedies provided for in clause 27 before approaching the court.

[7] It is argued that the plaintiffs erred by wholly disregarding the dispute resolution procedure provided for in clause 27 of the agreement. The arbitration clause meets the requirements as set out in *O & L Leisure (Pty) Ltd v Kelanna Investment CC T/A Chicago's Pub and Grill*[1]*.* This is an expeditious and less costly manner to resolve the issue and in terms of the agreement between the parties and

[1] *O & L Leisure (Pty) Ltd v Kelanna Investment CC T/A Chicago's Pub and Grill* (HC-MD-CIV-ACT-CON-2020/01118) NAHCMD 107 (35 February 2021).

as such, clause 27 should be applicable to the parties as there is a dispute between the parties, which fell within the compass of the arbitration clause.

[8] The court was referred to *Opuwo Town Council v Dolly Investments CC*[2] where the court said that the party resisting to the stay-of-court proceedings bears the onus of convincing the court that owing to exceptional circumstances the stay should be refused.

The plaintiffs' argument

[9] The plaintiffs argue that at this stage the pleadings have closed and the parties are beyond the Pre-Trial stage and therefore deep in litigation already. As such, it is argued that a party is not entitled to an unlimited right to refer a matter to private arbitration, or to evoke their right to alternative mechanisms. Section 6 of the Arbitration Act 42 of 1965 imposes an obligation on a party, after entering appearance to defend but before delivering any pleadings or taking any other steps in the proceedings to apply to the court for a stay of such proceedings and referral to arbitration. It is however true that major procedural milestones have already been achieved in this matter. The claim was instituted during 2020 and at the same time defended by the defendants.

[10] The initial plea filed by the defendants on 22 September 2021 did not contain any reference to the arbitration clause. It is therefore argued that as per the provisions of section 6(1) there was not any reasonable basis provided to the court as to why this request is made at such a late stage in the proceedings.

[11] From their pleadings it is further clear that they were given the determination by the Principal Agent on 18 May 2017, during 2018 and 2019 and finally on 5 May 2020. They had 14 days to indicate that they are not satisfied with the ruling, as per clause 27 of the contract, which they never did. This resulted that the ruling of the Principal Agent becoming binding on the parties as they failed to refer the matter to arbitration. It was further argued that the defendants through their conduct, created a situation where third parties obtained a lien against the property in terms of a court order given in case number HC-MD-CIV-MOT-GEN-2016/00342. The plaintiffs

[2] *Opuwo Town Council v Dolly Investments CC* 2017/03148 [2018] NAHCMD 309 (24 September 2018).

further claimed damages over and above what the contract provides for. The determination of these issues are over and above the scope of the arbitration as contemplated in clause 27 of the agreement.

[12] It was further argued that the defendants requested the court to dismiss the matter based on the special plea application which is inconsistent with the position under section 6 of the Arbitration Act, 42 of 1995 which provides for an application to be brought to stay a matter pending the outcome of arbitration proceedings.

Legal considerations

Arbitration Act 42 of 1965

[13] Section 6 of this Act deals with the stay of legal proceedings where there is an arbitration agreement and reads as follows:

> '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.'

[14] Under section 3 of this Act, the court was clothed with certain powers to make certain orders. Subsection (2) sets out the type of orders a court may make and reads as follows:

> '2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown -
> (a) set aside the arbitration agreement; or
> (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
> (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

<u>Arbitration</u>

[15] In the matter of *Trusco Group International (Pty) Ltd v Namibia Rugby Union*[3] Van Niekerk J referred to the following conditions for obtaining a stay of proceedings pending the outcome of arbitration. These were:

> 'five conditions for obtaining a stay as set out in Jacobs, The Law of Arbitration in South Africa, (1977) at paras. 47 – 51 on p. 49 – 51:
>
> (i) a valid arbitration agreement in respect of a dispute within the scope of the aforesaid agreement;
>
> (ii) the applicant for a stay must be entitled to rely on an arbitration agreement;
>
> (iii) no step must be taken after the appearance to defend;
>
> (iv) the applicant must be ready and willing to arbitrate;
>
> (v) there must be no sufficient reason for refusing a stay.'

[16] In *Ekandjo v O'B Davids Properties CC*[4] the following was said regarding agreements:

> '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.'

[17] However, this does not mean that the presence of an arbitration clause means that the matter must be automatically stayed. In *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd*,[5] the following was said:

> 'The onus is on the respondent to satisfy the court that it should not in its discretion refer the matter to arbitration - . . . A court will only refuse to refer the matter to arbitration where a very strong case has been made out - . . .'

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[3] *Trusco Group International (Pty) Ltd v Namibia Rugby Union* (2781 of 2010) [2014] NAHCMD 169 (27 May 2014).

[4] *Ekandjo v O'B Davids Properties* CC (HC-MD-CIV-ACT-DEL- 381 of 2020) [2021] NAHCMD 448 (01 October 2021).

[5] *Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd* (5541/2011) [2012] ZAFSHC 141 (10 August 2012).

Discussion

[18] The party relying on the arbitration clause bears the onus of establishing that all the necessary underlying jurisdictional facts are available and that all the pre-conditions contained in the agreement have been complied with. In this instance the first defendant must show good grounds as to why this application was brought at such a late stage of the proceedings and not in the beginning of proceedings before any exchange of pleadings and case management took place. The first defendant failed to do so. It further failed to explain why it did not, after the receipt of the determination by the Principal Agent, took the matter further as provided for in clause 27 of the agreement.

[19] It must further be noted that the relief sought by the plaintiffs is relief wider than just in terms of the agreement. The plaintiffs seek damages as well as additional costs incurred to safeguard and repair the site. This relief will fall outside the contract and cannot be determined by an arbitrator.

[20] Only one of the three defendants is a party to the contract. The second and third defendants are sued in their own names and there was never a contractual relationship between them and the plaintiffs. The arbitration clause in the agreement between the plaintiffs and the first defendant therefore is not applicable to the second and third defendant and the court cannot refer the matter against them to arbitration.

[21] For these reasons I am of the opinion that the plaintiffs indeed discharged the onus which rested on them to convince the court that the matter should not be referred to arbitration and I therefore make the following order:

1. The application is dismissed with costs.
2. Such costs to include the costs of one instructing and one instructed counsel.
3 The parties to file their joint pre-trial report in word format on or before 9/2/2023.
4 The case is postponed to 14/02/2023 at 15:30 for Pre Trial Conference hearing (Reason: Parties to file joint pre-trial conference report).

E RAKOW

Judge

APPEARANCE

PLAINTIFFS:	T Phatela Instructed by Office of the Government Attorney, Windhoek
RESPONDENT:	A Brendell Of Shikongo Law Chambers, Windhoek