

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**RULING ON SPECIAL PLEA OF ARBITRATION**

Case no: HC-MD-CIV-ACT-CON-2023/00897

In the matter between:

**UAG INVESTMENTS (PTY) LTD (PREVIOUSLY KNOWN  
AS UNITED AFRICA GROUP (PTY) LTD)**

**PLAINTIFF**

and

**FOOTAGE INVESTMENTS (PTY) LTD T/A  
TULIPOHAMBAMBA TRAINING & ASSESSMENT  
INSTITUTION  
TIRONE SYDNEY MAMPANE**

**FIRST DEFENDANT  
SECOND DEFENDANT**

**Neutral citation:** *UAG Investments (Pty) Ltd v Footage Investments (Pty) Ltd* (HC-MD-CIV-ACT-CON-2023/00897) [2023] NAHCMD 689 (30 October 2023)

**Coram:** SCHIMMING-CHASE J

**Heard:** 5 October 2023

**Delivered:** 30 October 2023

**Flynote:** Special plea – Defendants 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 raised and discussed.

Practice – Rules of court – Costs – Rule 32(11) – Whether the rule applies where a special plea is raised – Special plea is not interlocutory in nature – Rule 32(11) is not applicable.

**Summary:** On 23 February 2023, the plaintiff instituted legal action against the defendants for unpaid rental amounts. The defendants raised a special plea of arbitration, pleading that the written lease agreement provides that any dispute stemming from the aforesaid agreement must be referred to arbitration.

*Held*, a party that relies on an arbitration clause, must establish that all the necessary underlying jurisdictional facts are available, and that all the preconditions, contained in the agreement, have been complied with.

*Held*, the terms of the arbitration clause provide for a referral to arbitration in the event of a dispute. A dispute exists between the parties and no special preconditions had to be met. The defendants have accordingly met the jurisdictional facts for stay of proceedings pending the finalisation of the arbitration proceedings.

*Held further that*, a special plea is not interlocutory in nature and, therefore, is not subject to rule 32(11).

The special plea of arbitration is upheld with costs.

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## ORDER

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1. The special plea of arbitration by the defendants is upheld with costs.

2. The action in this matter is stayed pending finalisation of the arbitration proceedings.
3. The matter is postponed to **8 April 2024** at **15h30** for a Status hearing.
4. The parties are directed to file a status report reporting on the progress and further conduct of the matter on or before **3 April 2024**.

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## JUDGMENT

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SCHIMMING-CHASE J:

Introduction

[1] Up for determination is a special plea based on the terms of a written lease agreement referring any dispute between the parties to arbitration.

[2] The plaintiff is UAG Investments (Pty) Ltd (previously known as United Africa Group (Pty) Ltd), a company, registered in terms of the applicable laws of the Republic of Namibia, with registration number 97/084.

[3] The first defendant is Footage Investments (Pty) Ltd t/a Tulipohamba Training & Assessment Institution, a company, registered in terms of the applicable laws of the Republic of Namibia, with registration number 2011/0064.

[4] The second defendant is Tirone Sydney Mampane, a major male person, and director and surety of the first defendant.

[5] For purposes of this ruling and ease of reference, I refer to the plaintiff as 'UAG', the first defendant as 'Footage' and the second defendant as 'Mr Mampane', respectively. Where reference is made to Footage and Mr Mampane, jointly, I refer to them as 'the defendants'.

### Background

[6] UAG instituted legal action against the defendants jointly and severally on 23 February 2023 claiming payment in the amount of N\$816 330,19 together with interest and costs of suit on an attorney and client scale, for alleged unpaid rental.

[7] It is alleged that on 9 October 2015 at Windhoek, UAG concluded a written lease agreement ('the agreement') with Footage. The parties were duly represented and a copy of the agreement is attached to the particulars of claim.

[8] In terms of the agreement, Footage would lease Erf 7495, No 25 Kallie Roodt Street, Unit A, Windhoek ('the property') from UAG as of 1 November 2015 for a period of five years. Should Footage remain in occupation of the property at the end of the initial lease period, it would continue to be bound by the terms and conditions of the agreement and be liable to pay all costs, charges and fees as stipulated in the agreement.

[9] The basic monthly rental<sup>1</sup> would be as follows:

- (a) N\$87 547,20 (1 November 2015 to 30 September 2016);
- (b) N\$96 301,91 (1 November 2016 to 30 September 2017);
- (c) N\$105 932,11 (1 November 2017 to 30 September 2018);

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<sup>1</sup> UAG alleged that there would be an annual escalation for operational costs at 13 percent per annum and an annual escalation for rental amounts at ten percent per annum.

(d) N\$116 525,32 (1 November 2018 to 30 September 2019);

(e) N\$128 177,86 (1 November 2019 to 30 September 2020).

[10] In support of its claim, UAG alleged that the agreement did not terminate on 30 September 2020, because Footage remained in occupation, alternatively in possession of the property.

[11] It was further alleged that UAG complied with the terms of the agreement, whereas, Footage breached the said agreement having failed to pay the full monthly rental amounts, monthly operating costs, penalty charges, and interest during the period of April 2020 to October 2020, amounting to unpaid rental amounts of N\$816 330,19. This is the main thrust of UAG's claim (emphasis added).

[12] The defendants raised a special plea of arbitration in which they alleged that UAG's claim against the defendants is premised on the agreement and that in terms of clause 27, it was agreed between the parties that 'any dispute, question or difference whatsoever arising at any time between the parties' would be referred for arbitration. In this regard, the defendants pleaded that UAG's claim is in respect of unpaid rental amounts which arise from the agreement. The defendants dispute the claim, and this was purportedly brought to the attention of UAG, prior to the institution of these proceedings. It is the defendants' plea that the dispute falls squarely within the ambit of clause 27, and UAG has not referred the dispute to arbitration. As a result, the defendants pray that the action be stayed pending the outcome of the arbitration in terms of the agreement.

[13] The defendants also pleaded on the merits of the case, as is required. It is the defendants' case that UAG was in breach of the agreement, having 'locked' Footage and its personnel out of the property during May 2019 to August 2019 thereby cancelling and/or repudiating the agreement. The defendants amplified their case by pleading that full payment was made on all

outstanding arrears on 25 September 2023<sup>2</sup> and during July/August 2019 at Windhoek, the parties – save for Mr Mampane – concluded an oral agreement in terms of which Footage would lease the property from UAG at a reduced rental amount of N\$72 044,05 as of August 2019.

[14] In its replication, UAG pleaded that the defendants' case as pleaded, is that the agreement upon which UAG's claim is based, was replaced by a new 'purported' oral agreement concluded in July/August 2019. Therefore, the defendants' case is not bound by the provisions of the agreement. UAG further replicated that the defendants 'do not, as required, formulate the nature of the alleged dispute in their special plea, and neither do they, as required, plead compliance with preconditions for arbitration.' In any event, UAG replicated that clause 27 of the agreement does not preclude litigation as the parties consented thereto, at the option of UAG, within the meaning of clause 29 of the agreement.<sup>3</sup>

[15] Clause 27 of the agreement reads as follows:

'27. Dispute Resolution

27.1 In case of the need for Dispute Resolution it is hereby agreed that any dispute, question or difference whatsoever arising at any time between the parties out of or in regard to this Agreement, including but not limited to the following:

27.1.1 the rights and duties of any party hereto;

27.1.2 the interpretation of this agreement;

27.1.3 the termination of any matter arising out of the termination of the Agreement and

27.1.4 the rectification of this Agreement shall be submitted to and decided by arbitration or notice given by either party to the other in terms of this Clause.

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<sup>2</sup> This may be a typographical error by the drafter of the plea given that the plea is dated July 2023.

<sup>3</sup> Clause 29 of the agreement provides that at the option of UAG, any action or application arising out of the lease agreement may be brought in any magistrates' court having jurisdiction in terms of s 45 of the Magistrate's Court Act 32 of 1944, as amended.

27.2 Nothing herein contained or implied shall prevent or prohibit any party from obtaining urgent relief from a court of competent jurisdiction in appropriate circumstances.

...

27.6 This Clause 27 shall constitute each party's irrevocable consent to the arbitration proceedings, and no party shall be entitled to withdraw therefrom or to claim at any such arbitration proceedings that it is not bound by this Clause.

...

27.7.5 This Clause 27 shall be severable from the remaining provisions of this Agreement and shall continue to be of application, notwithstanding the cancellation or purported cancellation of this Agreement' (Emphasis supplied.)

#### Parties' submissions

[16] Mr Avila, on behalf of the defendants, referred to this court's decision in *Trustco Group International (Pty) Ltd v Namibia Rugby Union*<sup>4</sup> where the requirements to be met for a stay of proceedings pending the outcome of arbitration were set out as follows:

- (a) The existence of the arbitration clause or agreement, which must be in writing;
- (b) That the arbitration clause or agreement is applicable to the dispute between the parties;
- (c) That there exists a dispute between the parties, which dispute must be demarcated in the special plea; and

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<sup>4</sup> *Trustco Group International (Pty) Ltd v Namibia Rugby Union* (2781 of 2010) [2014] NAHCMD 169 (27 May 2014).

(d) That all preconditions contained in the agreement for commencing arbitration have been complied with.

[17] The defendants submitted that it is common cause that the parties signed the agreement containing the arbitration clause. In this regard, it is submitted that the first requirement has been met in that an agreement between the parties exists, and which agreement includes an arbitration clause.

[18] It was submitted further that 'any dispute' as set out in clause 27.1.1 includes 'a dispute of the rights and duties of any party thereto'. It is the defendants' argument that UAG's claim for payment of unpaid rental amount together with the plea on the merits – 'falls squarely within the definition of clause 27'.

[19] Mr Avila argued that the alleged non-performance of the defendants' duties, as envisaged in the agreement, constitutes a dispute in terms of the provisions of the agreement which is subject to clause 27. In the result, Mr Avila submitted that the second requirement has been met.

[20] As regards the fourth requirement, Mr Avila argued that it does not find application in that on a proper reading of the clause, no preconditions have to be met.

[21] As regards the requirement of demarcating the dispute in the special plea, Mr Avila submitted that there was substantial compliance with this requirement because the defendants pleaded that the dispute relates to the unpaid rental amounts arising from the agreement, which the defendants dispute, and which dispute has not been referred to arbitration as required by clause 27. In the result it was submitted that the jurisdictional facts as set out in the *Trustco* matter have been met by the defendants.



[22] Mr Diedericks, on behalf of the plaintiff, argued that the defendants have not met any of the four jurisdictional facts as set out in the *Trustco* matter.

[23] In this regard, it was submitted that the defendants distance themselves from the agreement in that they plead that there is a purported oral agreement concluded in July/August 2019. He argued that on the one hand, the defendants seek a referral of the dispute to arbitration, under the agreement, and on the other hand, they distance themselves from the agreement arguing that it had been cancelled and replaced with an apparent oral agreement. As such and if I understand counsel's contention correctly, the first requirement of the *Trustco* matter has not been met given that the dispute now goes to the issue of whether a purported oral agreement exists or not.

[24] In respect of the second requirement, Mr Diedericks argued that clause 27 does not find application in that the defendants conflate the difference between a 'dispute' and a 'demand'. Counsel contended that UAG's claim is a demand for payment and not a dispute. Therefore, clause 27 finds no application. He argued that a dispute must be referred to arbitration in terms of the agreement and not a demand for payment. Counsel, however, agreed – when questioned by the court – that where a party disputes the amount owed in terms of a lease agreement, the same equates to a dispute.

[25] Mr Avila argued in response that UAG's claim is that the defendants breached the agreement by not making payment and, therefore, it cannot be gainsaid that UAG's claim is a dispute and not a 'demand' – the claim is premised on a breach of agreement, the defendants argued.

[26] As regards the submission by Mr Avila that there are no preconditions to be met, Mr Diedericks argued that clause 27.1.4<sup>5</sup> of the agreement demands that the defendants give notice to UAG. Therefore, Mr Diedericks

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<sup>5</sup> Clause 27.1.4 reads that 'the rectification of this Agreement shall be submitted to and decided by arbitration or notice given by either party to the other in terms of this Clause.'

argued the defendants have failed to meet the fourth requirement as per the *Trustco* matter as no notice was given to UAG by the defendants. In contrast, Mr Avila argued that clause 27.1.4 is 'ambiguous' and refers to rectification. Mr Avila's contention was that notice is only required in respect of rectification and not in terms of a dispute as envisaged by the agreement. In any event, it was submitted, by Mr Avila and it appears undisputed, that the parties had discussed this issue even prior to the institution of these proceedings.

[27] Mr Diedericks also argued that clause 29 confers an option on UAG to litigate, in any event. In this regard he submitted that whether litigation is in the High Court or Magistrates' Court is irrelevant.

### Legal principles

[28] The Supreme Court in *NWR (Pty) Ltd v Ingplan Consulting Engineers and Project Managers (Pty) Ltd and Another*<sup>6</sup> held that '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.'

[29] The party who relies on an arbitration clause, must establish that all the necessary underlying jurisdictional facts are available and that all the preconditions contained in the agreement have been complied with.<sup>7</sup> However, 'the party resisting the stay-of-court proceedings bears the onus of convincing the court that owing to exceptional circumstances the stay should be refused.'<sup>8</sup> This entails that unless compelling reasons are placed before court on why the court should not enforce the agreement to arbitrate, such order shall be made.<sup>9</sup>

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<sup>6</sup> *NWR (Pty) Ltd v Ingplan Consulting Engineers and Project Managers (Pty) Ltd and Another* (SA 55 of 2017) [2019] NASC 584 (12 July 2019) para 29.

<sup>7</sup> *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) para 18.

<sup>8</sup> *Opuwo Town Council v Dolly Investments CC* (HC-MD-CIV-ACT-CON-2017/03148) [2018] NAHCMD 309 (24 September 2018) para 14.

<sup>9</sup> *Ibid* para 14.

[30] The court always has discretion whether to call a halt for arbitration or to tackle the dispute itself.<sup>10</sup>

[31] Ueitele J held the following in *Radial Truss Industries (Pty) Ltd v Shipofi*<sup>11</sup>:

‘An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. 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 (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly.’ (Emphasis supplied.)

## Discussion

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<sup>10</sup> Ibid para 16.

<sup>11</sup> *Radial Truss Industries (Pty) Ltd v Shipofi* (HC-MD-CIV-ACT-CON-2018/03205) [2020] NAHCMD 434 (16 September 2020) para 14.

[32] It is the defendants' contention that they have met all four requirements as set out in the *Trustco* matter. Their contention is that UAG's claim is premised on the written agreement, which contains an arbitration clause that is applicable to the dispute between the parties. This was raised in the special plea and was properly demarcated or so the defendants' contended. In addition, clause 27.6 is relevant as it specifically provides that the dispute resolution clause constitutes each party's irrevocable consent to the arbitration proceedings, and no party shall be entitled to withdraw from its provisions. As for the preconditions, the defendants contended that no preconditions had to be met outside the raising of the special plea.

[33] UAG argues the contrary, reliance being placed on the argument that the defendants fail to meet all four jurisdictional facts. It is UAG's contention that no arbitration clause exists as no written agreement exists given that the defendants' defence is premised on an apparent oral agreement concluded in July/August 2019. UAG further argued that the defendants' plea on the merits amounts to non-compliance with the third requirement – to demarcate the special plea.

[34] In substantiating UAG's argument, counsel referred to *Namibia Power Corporation (Pty) Ltd v Congo Namibia (Pty) Ltd*<sup>12</sup> at paras 40 and 42 where the learned Judge 'considers that the defendant's position as one marred with ambiguity, and observes that the case is one where the defendant wants its cake and eat it'. I find this matter distinguishable to the present matter given that in the *Power Corporation* matter, the court was tasked to determine two special pleas raised by the defendant; the one special plea was on the illegality of the written agreement and the other special plea was to refer the matter to arbitration in terms of the alleged illegal written agreement. In the present matter, one special plea exists. It cannot be said that *Power Corporation* finds application here simply because the defendants pleaded on the merits of the case whilst raising a special plea of arbitration.

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<sup>12</sup> *Namibia Power Corporation (Pty) Ltd v Congo Namibia (Pty) Ltd* (HC-MD-CIV-ACT-CON-2019/03067) [2021] NAHCMD 210 (5 May 2021).

[35] It is my considered view that the defendants are bound by law to plead over the merits of the case despite raising a special plea. Daniels<sup>13</sup> states the following as regards this:

‘... In most cases it is necessary to plead over on the merits when there is a special plea. But while exceptions are for the most part dealt with separately and before the trial, pleas in abatement are in general only dealt with at the trial. This distinction renders it the more necessary still to plead all available defences when pleading in abatement. The rule of law allows only one pleading, though this may deal with defences upon a variety of grounds.’ (Emphasis supplied.)

[36] UAG’s contention in avoiding this special plea is that the dispute that must be addressed is whether or not an oral agreement was concluded in July/August 2019. As such, UAG is of the view that the defendants cannot disassociate from the agreement, but also comply therewith. In summary, the defendants cannot have their cake and eat it too, counsel argued. In any event, the agreement also provides that the dispute resolution clause shall be severable from the remaining provisions of the agreement and shall continue to be of application, notwithstanding the cancellation or purported cancellation of the agreement.<sup>14</sup>

[37] It appears that UAG, now, ventures into the merits of the case and fails to stay within the four corners of the special plea. In this regard, Mr Diedericks referred to *David Beckett Construction (Pty) Ltd v Bristow*<sup>15</sup> in substantiating his argument. I find the facts in the *David Beckett* matter distinguishable and of no application to the present matter. In the *David Beckett* matter, an exception was raised alleging that a special plea, embodied in a plea, disclosed no cause of action. The complaint requiring a decision was that the defendant's prayer was not content with a stay of proceedings but sought dismissal of plaintiff's claim. Effectively the defendant overstepped the mark in

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<sup>13</sup> H Daniel Beck's *Theory of and Principles of Pleading in Civil Actions* 6 ed (2002) at 153.

<sup>14</sup> By contrast see *Namibia Power Corporation v Congo Namibia Pty Ltd (supra)*. In this matter there was no provision in the agreement for the severability of the arbitration clause.

<sup>15</sup> *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 at 280-281.

its prayer for a dismissal of the claim, despite having in a separate paragraph, pleaded that the plaintiff's action 'should be stayed pending the arbitration'. The court held<sup>16</sup> that the defendant seemed simply to have called 'for medicine which was too strong rather than asking for the wrong medicine altogether.' Given the facts of that matter, it cannot be said that the *David Beckett* matter assists UAG in its argument.

[38] In any event, in its argument and replication, it is apparent that there is indeed a dispute as defined in clause 27 of the lease agreement.

[39] In light of the foregoing, I am satisfied that the defendants have substantially complied with the requirements to be met for a stay of proceedings pending the outcome of arbitration. I exercise my discretion in favour of staying the proceedings, as there is a dispute present between the parties relating to the rights and obligations of the parties that an arbitrator can determine. The purported repudiation issue does not invalidate or oust the dispute resolution clause, which specifically provides for its applicability in the event of cancellation or purported cancellation of the agreement.

### Costs

[40] Having found that the defendants are successful in their special plea of arbitration, I must now consider the issue of costs. Counsel are *ad idem* that the court should grant a costs order that is not subject to rule 32(11) of the rules of court. In *Radial Truss Industries (Pty) Ltd v Shipofi*<sup>17</sup> Ueitele J held as follows:

[22] The question of whether or not a special plea is an interlocutory matter or not came up for determination in the matter of *Uvanga v Steenkamp & Others* where Masuku J held that a special is capable of being dispositive of the entire cause of action between the parties, a characteristic that does not normally attach to

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<sup>16</sup> *Ibid* at 276 C-D.

<sup>17</sup> *Radial Truss Industries (Pty) Ltd v Shipofi* (HC-MD-CIV-ACT-CON-2018/03205) [2020] NAHCMD 434 (16 September 2020) paras 23 – 27.

interlocutory proceedings, which normally deal with preliminary issues that do not go to the essence of the core issues in dispute. He continued and said:

“... a special plea can either be dilatory or peremptory. In the instant case, the plea of *locus standi* was not dilatory but peremptory as it sought to quash the proceedings altogether. It could not, in the circumstances, be said to be interlocutory and preparatory in nature, as it were, and dedicated to deciding side issues, necessary to be put to bed before the determination of the actual cause of action. Interlocutory proceedings remove temporary impediments and conduce to the hearing of the real issues raised in the cause of action.

[19] On the other hand, the Black’s Law Dictionary, defines ‘interlocutory’ as meaning ‘interim or temporary, not constituting a final resolution of the whole controversy.’ I am of the considered view that the special plea in this matter was sought to quash the entire claim and the fact that it was dismissed does not detract from its intended effect. More importantly, in my view, it was not raised as an interim or temporary measure but, as stated, was geared towards having the entire case indirectly dismissed, even though not on the merits.... In the premises, I am of the considered view that the special plea raised in this matter was not, as held by the Taxing Master, an interlocutory application within the meaning of rule 32.”

[23] In this matter, the special plea raised by the defendants also sought to quash the entire claim and was not raised as an interim or temporary measure but, as stated, was geared towards having the entire case directly dismissed, even though not on the merits. I am thus of the view that the decision or rationale arrived at by Justice Masuku reflects the correct legal position and the special plea in this matter is therefore not interlocutory and not subject to Rule 32 (11).’ (Emphasis supplied.)

[41] In view of the sentiments expressed by Ueitele J in the *Radial Truss* matter which I respectfully agree with, I find that a special plea is not interlocutory in nature and, therefore, is not subject to rule 32(11). Especially given that when a party raises a special plea for determination, the parties are not obliged to comply with rule 32(9) and (10) of the rules of court. I accordingly find that costs in this matter shall not be subject to rule 32(11).

[42] What needs to be determined, however, is to whom costs must be awarded to. The general rule is that the successful party shall be indemnified with costs. It is further a general rule that the granting of costs is discretionary to the court.

[43] I see no reason why the general rule should not follow. I, therefore, find that the defendants have been successful in arguing this special plea of arbitration and should be awarded costs in their favour.

### Conclusion

[44] Having found that the defendants are successful in their special plea of arbitration and having granted costs in their favour, I make the following order:

1. The special plea of arbitration by the defendants is upheld with costs.
2. The action in this matter is stayed pending finalisation of the arbitration proceedings.
3. The matter is postponed to **8 April 2024** at **15h30** for a Status hearing.
4. The parties are directed to file a status report reporting on the progress and further conduct of the matter on or before **3 April 2024**.

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E M SCHIMMING-CHASE

Judge



APPEARANCES

PLAINTIFF:

J Diedericks

Instructed by Isaacks & Associates,  
Windhoek

DEFENDANTS:

R Avila

Of Metcalfe Beukes Attorneys,  
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