

REPUBLIC OF NAMIBIA

NOT REPORTABLE

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

Case no: I 4410/2013

In the matter between:

HARRY VOLTAIRE**PLAINTIFF**

and

**SHIKONGO LAW CHAMBERS
STANDARD BANK OF NAMIBIA LTD
GOODFELLAS INVESTMENT CC****FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT**

Neutral citation: *Voltaire vs Shikongo Law Chambers & 2 Others (I 4410/2013)*
[2017] NAHCMD 65 (8 March 2017)

Coram: MILLER AJ**Heard:** 28 July 2015

Delivered: 8 March 2017

Summary: This is a special plea that has been raised by the third defendant of arbitration against the first plaintiff. The special plea is raised on the ground that the consultancy agreement between the plaintiff and the third defendant provides for a compulsory arbitration, referral to arbitration of the matter.

ORDER

1. The special plea is dismissed.
2. The third defendant is ordered to pay the costs on the basis of one instructing and two instructed counsel.
3. The matter is postponed to the 28th of March 2017 for a status hearing and for the matter to be allocated to a new managing Judge.

JUDGMENT

MILLER, AJ:

[1] The plaintiff claims repayment of US\$125 000.00 deposited with the first defendant in anticipation of conclusion / execution of an agreement with the third defendant. The third defendant has filed a special plea that the matter should have been referred to arbitration in terms of provisions of the agreement entered into by the plaintiff and the third defendant.

[2] The plaintiff in this matter is Harry Voltaire, an American male investment banker. The third defendant is a close corporation trading as GoodFellas Investment CC that conducts consultation business in Namibia.

[3] The facts of the case are as follows. The plaintiff and the third defendant signed a consultancy agreement (the agreement) on the 29 October 2013. In terms of the 'purported agreement', GoodFellas was to provide consulting service to the plaintiff in relation to the property market in Namibia.

[4] Pursuant to the agreement on the 29th of October 2013, the plaintiff deposited U\$ 125 000.00 into the first defendant's client account (Shikongo Law Chambers). The U\$ 125 000.00 was to compensate and disburse the third defendants for services rendered. On the 25th of November 2013, the plaintiff instructed the firm to repay the money he had deposited. The first defendant refused, on the ground that the money belonged to the third defendant and not the plaintiff.

[5] The Plaintiff instituted legal proceedings against the first to third defendants and the second and third defendants defended the action. The third defendant contends that the agreement has a compulsory arbitration clause which had been raised in the amended plea of the third defendants. The third defendant further contends that there are good reasons why the matter should be referred to arbitration. Firstly the nature of the dispute and that the dispute between the plaintiff and the first defendant will be influenced or rather determined by the outcome of the dispute between the plaintiff and the third defendant.

[6] The bone of contention that the Court is called upon to decide is whether the dispute between the plaintiff and the third defendant should be forwarded to arbitration. Clause 10 encompasses the arbitration clause and it reads verbatim:

'(c) This Agreement shall be governed by and construed in accordance with the law of Republic of Namibia. Any dispute arising directly or indirectly out of or related in any way with this Agreement which the Parties have failed to resolve in a reasonable period of time shall be submitted to binding arbitration conducted in English by one or more arbitrators in accordance with such Rules. Award and decision of such arbitrators shall be final and binding upon the Parties and their respective successors and permitted assigns. Judgment upon such award or decision may be entered in any court having jurisdiction thereof.'

[7] In the case of Umso Construction Pty Ltd v Bk Investments Holdings (Pty) Ltd¹, the following was stated at para 7 of the judgment –

‘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 - . . .’

[8] Mr. Marais SC, who appeared for the plaintiff, submitted several reasons why the special plea should not be granted. They are:

1. The plaintiff’s main claim falls outside the consultancy agreement, in other words, it falls outside of the arbitration clause.
2. There are different parties before Court, one regulated by an arbitration clause and the other not.
3. There is a counter claim that is not subjected as it were to the arbitration clause, by the very party who seeks to rely on arbitration that is still alive and well before this Court.
4. The plaintiff claims that the contract containing the arbitration clause is void and voidable.

[9] Although it may appear from reading the papers that there is some ambiguity as to when the agreement came into effect. The matter was not raised in the proceedings before me and not relied in support of any argument advanced by either of the parties.

[10] I am in agreement with the submissions made by Counsel for the plaintiff which has the effect that there are good and valid reasons why the matter should not be referred to arbitration.

¹ (5541/2011) [2012] ZAFSHC 141 (10 August 2012)

[11] For these reasons, I make the following orders:

1. The special plea is dismissed.
2. The third defendant is ordered to pay the costs on the basis of one instructing and two instructed counsel.
3. The matter is postponed to the 28th of March 2017 for a status hearing and for the matter to be allocated to a new managing Judge.

PJ Miller

APPEARANCES:

For the Plaintiff:	J Marais SC (with him, JP Jones)
Instructed by:	Koep and Partners, Windhoek

For the Third Defendant:	N Tjombe
Of:	Tjombe-Elago Inc, Windhoek