INVESTORS IN AFRICA-TAKURA

VENTURES (PRIVATE) LIMITED

versus

LAKAVERT INVESTMENTS (PRIVATE) LIMITED

and

INTERFIN BANKING CORPORATION LIMITED

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE, 3 and 5 July 2012

**Opposed Application**

*F Rudolph,* for the excipient/first defendant

*J Mandevere,* for the excipient/second defendant

*Ms F Nyakabau,* for the respondent/plaintiff

 KUDYA J: This is a special plea raised by the first and second defendants against the plaintiff’s claim in case HC 7222/11.

At the commencement of the application, the proceedings against the second defendant were by consent of all the parties stayed in terms of s 54 (2) of the Banking Act [*Cap 24:20*]; it having been placed under curatorship by the Central Bank on 11 June 2012. I proceeded to hear the first defendant’s special plea.

The facts are these: On 26 July 2011 the plaintiff issued summons out of this court jointly and severally, the one paying the other to be absolved against the two defendants for payment of US$ 748 000-00 for 4 250 ordinary A Class shares in Karina (Pvt) Ltd purchased by the first defendant and guaranteed by the second defendant, interest and costs of suit.

The first defendant filed appearance on 18 August 2011.On 16 September it sought further particulars, which it abandoned after the irregularity in the request was pointed out by the plaintiff. It pleaded over to the merits on 23 September 2011. The plaintiff replicated to the plea on 18 October 2011. On 15 November it filed another plea that was more detailed than the first one.

Meanwhile, on 21 October 2011 it had filed a special plea. It set the special plea down together with heads of argument on 11 November 2011. The ten days it could set down the special plea with the plaintiff’s consent expired on 4 November 2011. In the absence of such consent it had until 10 November to do so. It improperly set the matter down on 11 November. It had to await the date of trial to argue the special plea. Thus while it complied with r 238 (1a) it fell foul of r 138 (a) or (b). Unlike in *City of Harare* v *D & P Investments* (*Pvt*) *Ltd & Anor* 1992 (2) ZLR 254 (S) at 257 E-F where the excipient had sixteen days to set the exception down, in the present matter the first defendant had fourteen days to do so. The special plea is not properly before me for lack of compliance with r 138 (b).

I would have dismissed the special plea for this lack of compliance with r 138 (b) but for the submissions made by both counsel on 5 July 2012. Mr *Rudolph,* for the first defendant, conceded that the special plea was set down out of time but implored me to condone the breach of the rule on the basis of expediency. Ms *Nyakabau,* for the plaintiff, agreed with Mr *Rudolph*. In *Watson* v *Gilson Enterprises* (*Pvt*) *Ltd* 1998 (1) ZLR 381 (S) at 387 G GUBBAY CJ stated that:

“The provisions of the Rules are not strictly peremptory. But as they are there to regulate the practice and procedure of the High Court, in general, strong grounds have to be advanced to persuade the court or judge to act outside them. See *Sumbereru* v *Chirunda* 1992 (1) ZLR 240 (H) at 243B, *Makaruse* v *Hide & Skin Collectors* (*Pvt*) *Ltd* 1996 (2) ZLR 60 (S) at 65D-E; *Wilmot* v *Zimbabwe Owner Driver Organisation* (*Pvt*) *Ltd* 1996 (2) ZLR 415 (S) at 419C-D.”

I am not satisfied that the first defendant advanced any strong grounds to persuade me to act outside r 138 (b). The only ground advanced by both parties was that of convenience. While I do not wish my reasoning for departure to be regarded as setting a precedent in this and other matters that require strong grounds, I condone the departure for reasons of convenience to both parties and the High Court. In my view, it would be a waste of the court’s time and resources to defer argument of the matter to trial when the parties have fully ventilated their arguments before me. In addition, I condone the lack of compliance on the ground that the first defendant was one day out of the prescribed time and the failure to abide by the rules was discovered by the court while preparing judgment after the special plea had been fully ventilated.

It is for these reasons that I decided to use r 4C (a) of the rules of court to condone the departure and determine the matter on the merits.

**The merits**

This is a very simple matter. On 1 November 2010 the plaintiff executed an agreement for the sale of 4 250 ordinary “A” Class Karina (Pvt) Ltd shares to the first defendant for US$748 000-00. The effective date of the sale was on 31 December 2010 provided the first defendant secured a guarantee of payment from the second defendant by that date. The condition precedent, clause 3 reads:

“3.1 This agreement will only come into effect upon receipt by Takura Ventures of an irrevocable letter of credit in its name, from Interfin Financial Holding, drafted to Takura Ventures’ satisfaction, for the total sum of US$798 000-00 (seven hundred and ninety eight thousand United States Dollars) being the full amount of the purchase price, plus the accrued interest thereon as at the effective date, as detailed in clause 4 below.

In the event that this condition precedent 3.1 is not fulfilled by 31 December 2010, then the agreement, and all, obligations pertaining to the parties, shall lapse.”

The due date of payment for both the capital amount and interest from 1 January 2011 at the rate of 20 per cent per annum, calculated on a daily basis, on the basis of 365 days in the calendar year in terms of clause 5 was on or before 30 April 2011.

Clause 12 deigned the written contract the sole memorial of the agreement between the parties and stated that “no novation variation or consensual cancellation of this agreement shall be valid unless reduced to writing and signed by or on behalf of all the parties hereto.”

Clause 14 states:

“In the event that any dispute shall arise between the parties as to the coming into effect of this agreement or its interpretation or arising out of the implementation of this agreement or its cancellation, then such dispute shall be referred to arbitration by an arbitrator appointed for that purpose by the parties or failing their agreement in that connection within 14 days of a dispute having been declared by either of them, appointed by the Commercial Arbitration Centre in Harare.”

On 31 December 2010, the second defendant bound itself, jointly and severally as a surety and co-principal debtor *in soldium* with the first defendant in the sum of US$798 000-00 due and payable by 30 April 2011. The second defendant bound itself to pay any amount outstanding after 30 April 2011 together with interest at 2.5% per month. In addition it renounced the benefits of excussion, division and cession of action.

In terms of clause 7, risk and profit passed to the first defendant from the effective date on payment of the purchase price and interest. The first defendant did not pay the purchase price on due date. It is apparent from the letter of the second defendant dated 16 May 2011 that it failed to meet the guarantee. In that letter the second defendant proposed to settle the sum of US$798 000-00 within ninety days from 16 May 2011. It is common cause that none of the defendants paid the purchase price and interest on or before the due date of 30 April 2011; hence the summons of 26 July 2011.

The first defendant specially pleaded that this court had no jurisdiction to entertain this matter in the first instance before referral to the arbitrator. Mr *Rudolph,* relied on s 8 (1) of the Arbitration Act [*Cap 7:15*] and clause 14 of the agreement for the submission that this court lacked the power to hear the action ahead of the arbitrator.

Article 8 reads:

“ARTICLE 8

*Arbitration agreement and substantive claim before court*

1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, *stay* *those proceedings and* refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
2. Where *proceedings* referred to in paragraph (1) of this article have been brought,

 arbitral proceedings may nevertheless be commenced or continued, and an award

 may be made, while the issue is pending before the court.”

Article 8 has been subject of judicial interpretation and application in the following cases that were cited by the parties.

1. *Independence Mining* (*Pvt*) *Ltd* v *Fawcett Security Ops* (*Pvt*) *Ltd* 1991 (1) ZLR 268 (H).
2. *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting* (*Pvt*) *Ltd*  1999 (2) ZLR 448 (H)
3. *PTA Bank* v *Ellaine* (*Pvt*) *Ltd & Ors* 2000 (1) ZLR 156 (H)
4. *Cargill Zimbabwe* v *Culvenham Trading* (*Pvt*) *Ltd*  2006 (1) ZLR 381 (H)
5. *Shell Zimbabwe* (*Pvt*) *Ltd* v *Zimsa* (*Pvt*) *Ltd* 2007 (2) ZLR 366 (H)

The principles that can be gleaned from these cases are that the party raising the special plea based on an arbitration clause must allege and prove:

1. The existence of the arbitration clause in the agreement;
2. That there exists a dispute between the parties; and
3. That the arbitration clause is applicable to the dispute between the parties.

Mr *Rudolph* submitted that the first defendant had proved the existence of all three requirements.

I agree that the agreement of sale of 1 November 2010 has an arbitration clause. The arbitration clause is wide and all encompassing. It allows any party to the agreement to refer to arbitration any issue on the commencement, interpretation and implementation of the agreement.

The first defendant filed a plea on 23 September raising disputes on whether payment was made and if so when and whether or not the shares were delivered. In the record of proceedings is another plea dated 15 November 2011, which does not qualify as its first statement on the substance of the dispute and whose status is unclear as it appears to be an irregular pleading. The first statement on the substance of the dispute was made by the first defendant in his plea of 23 September 2011 thus:

“The first defendant specifically pleads that the second defendant offered to settle the indebtedness in terms of the guarantee and which offer was rejected by the plaintiff, and as such the first defendant cannot be held liable as set out in the plaintiff’s claim.”

The first issue is therefore whether there exists a dispute between the parties. See *Cargill Zimbabwe*, case, *supra* at 382 F. At 383D-F MAKARAU J, (as she then was), stated that:

 “A dispute between the parties can only arise *ex-facie* the pleadings filed with the court. It cannot be assumed or presumed from the mere fact of an appearance to defend. It is my further view that the dispute cannot be brought to the attention of the court in the heads of argument for counsel cannot plead on behalf of the parties. It is trite that heads of argument are counsel’s conclusions and opinion of facts and law applicable to the facts of the matter. They are not part of the pleadings. From the above, it appears to me that, before raising a special plea staying proceedings in this court and referring the matter to arbitration the defendant must file a plea as to the merits of the matter for the dispute between the parties to arise *ex facie* the pleadings.”

The special plea relies on clause 14. It raises disputes on payment, time of payment and delivery of the shares.

It is noteworthy that the first defendant did not request that the matter be referred to arbitration in the plea of 23 November 2011. It thus failed to bring its special plea within the ambit of article 8. But more importantly is the determination of whether or not there exists a dispute between the parties that the arbitrator is capable of resolving. That it is the duty of the court to determine whether there exists a dispute is confirmed by SMITH J in the *PTA Bank* case, *supra* at 182D where he said:

“For my part, I do not agree that it should be for the arbitrator to determine the existence of the dispute. I prefer to support the decisions to the effect that the court can intervene to determine whether or not there is a dispute.”

The dispute set out in the plea of 23 September was whether or not payment was made by the second defendant and whether or not such offer was rejected by the plaintiff. The letter from the second defendant was written on 16 May 2011. It demonstrates beyond a shadow of doubt that neither the first nor the second defendant had made any payment to the plaintiff by the due date; on or before 30 April 2011. There is therefore no dispute that both the defendants were in breach of the agreement of sale. It is not in dispute that the shares would only be delivered on payment of the purchase price and accumulated interest. It does not appear to me that the attempted assumption of the whole debt by the second defendant after 30 April 2011 was binding on the plaintiff. This is because it went outside the terms of the agreement between the plaintiff and the first defendant. The agreement was for a guarantee of payment on or before 30 April 2011. The assumption would be an issue between the first and second defendant that falls outside the terms of the agreement between the plaintiff and first defendant. The action is predicated on breach of payment on or before 30 April 2011.

The arbitration clause is not applicable in the absence of a dispute. There is therefore nothing to refer to the arbitrator for determination.

Accordingly, the first defendant’s special plea is dismissed with costs.

*Scanlen & Holderness*, first defendant’s legal practitioners

*Sawyer & Mkushi*, second defendant’s legal practitioners

*Gill Godlonton & Gerrans*, plaintiff’s legal practitioners