FRASER ALEXANDER ZIMBABWE LIMITED
versus
RAVEN MINING ZIMBABWE (PRIVATE) LIMITED
t/a CHARTER MINE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 16 January 2014 and 29 January 2014

OPPOSED MATTER

Ms Ndawana, for the plaintiff
Mushoriwa, for the defendant

MTSHIYA J: On 1 July 2013, the plaintiff issued summons against Raven Mining (Private) Limited trading as Charter Mine. The plaintiff's claim in the summons was for payment of:

"a) US 89 522-52 (Eighty Nine Thousand Five Hundred and Twenty Two United States Dollars and Fifty-Two cents.

b) Interest thereon at the rate of 5% per annum calculated from the 26th March 2013 (being date of demand) to date of payment; and

c) cost of suit."

On 20 August 2013 Raven Mining Zimbabwe (Private) Limited (Excipient) filed an Exception in the following terms:-

"The Defendant hereby excepts to the Plaintiff's summons on the following grounds:

1. The summons is bad at law because it does not disclose a cause of action against Defendant in that;

1.1 There is no contractual nexus between the Plaintiff and Defendant as the agreement was clearly entered into between Plaintiff and Charter Explorations (Private) Limited.

1.2 Plaintiff is well aware that Defendant does not trade as Charter Mine, and that is apparent from the agreement which is attached to the summons as read with letters from Plaintiff to Defendant's legal practitioners dated the 29th July 2013, together with its attachment attached hereto as 'A'.

WHEREFORE the Defendant prays for the dismissal of the Plaintiff's claim with costs on the higher scale of attorney and client."

The above exception was filed together with a special plea which reads as follows:

"The Defendant pleads to Plaintiff's claim by way of Special Plea of Jurisdiction as follows:

1. The claim is based on an agreement which was attached to the summons by Plaintiff;
2. In terms of clause 10(s) of the said agreement, any dispute arising from the implementation of the agreement would be determined by arbitration.

WHEREFORE the Defendant prays for the dismissal of the Plaintiff's claim as against it with costs on a legal practitioner and client scale."

In its submissions the defendant (excipient) correctly argued that "Charter Explorations Limited and itself are two distinct corporate entities." (See *Solomon* v *Solomon & Co. Ltd* 1897 AC 22). That being the case, it was argued, the defendant would not answer to the plaintiff's claim. The plaintiff, it was argued, had cited a wrong entity.

Furthermore, with respect to the special plea, the defendant submitted that in terms of Clause 10(s) of the agreement between the parties, the dispute ought to have been referred to arbitration. The said Clause 10(s) relied upon provides as follows:

> "Any dispute arising from the provision of the services in accordance with these conditions shall be submitted to and determined by arbitration by one arbitrator, appointed and acting according to the rules of the International Chamber of Commerce (ICC). The place of arbitration shall be Sandton, Gauteng, Republic of South Africa and proceedings shall be conducted in the English language."

In support of its argument, the excipient went on to cite Article s 8 (1) of the Arbitration Act [*Cap 7:15*] which provides as follows:-

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party not so later than when submitting his first statement of 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".

Arguing that the plaintiff had not challenged the validity of Clause 10(s) of the agreement, the excipient urged the court to dismiss the plaintiff's claim with costs on a legal practitioner and client scale. It justified its prayer for costs on a higher scale on the basis that the plaintiff had persisted with its claim notwithstanding the fact that it had alerted the plaintiff to the defective nature of its summons.

On its part, the plaintiff submitted that there was evidence that it had cited the correct entity/defendant. It said that evidence was contained in the agreement as supported by other

documents that were placed before me with the consent of both parties. These were the complete document relied on as the agreement between the parties, and correspondence exchanged between the parties. The earlier copy of the agreement did not contain all pages (i.e. pp 7 and 9).

The plaintiff further submitted that the dispute before the parties was not the one envisaged by Clauses 10(s) of the agreement. It said there was no dispute over the services it supplied on behalf of the excipient and as such there was no need to refer the matter to arbitration. The plaintiff was merely suing for an undisputed amount of money which the excipient ought to pay for the services rendered on its behalf.

Whilst accepting that services were rendered at Charter Mines , the plaintiff submitted that its client was the excipient as cited in the summons. It said there was never any intention to treat Charter Mining Exploration (Pvt) Ltd mentioned in the documents exchanged, as the plaintiff's client. The plaintiff went on to say the acceptance of liability by Charter Mining Exploration (Pvt) Ltd was because the excipient and the said Charter Mining Exploration (Pvt) Ltd were "intertwined to the extent that their operations cannot be separated."

To reinforce its argument the plaintiff cited *Deputy Sheriff Harare* v *Trumpac Investments (Pvt) Ltd & Anor* HH 121/2011 where the court said:

> "The rational for this extension as I perceive it, is that where the operations of an economic group are so close as to be virtually indivisible, considerations of policy tend to militate against any legal separation of its integral units, for to do so would be to perpetuate an essential corporate fiction. Of course this may not invariably be the case, but the equities would favour such an approach in dealing at arms length with innocent outsider."

In determining this matter, I believe that the documents placed before the court by the plaintiff are clear and unambiguous. The documents define the parties to the contract and the parties' intention.

The agreement relied upon was first presented as a proposal but it was later elevated to a formal contract when the parties signed the proposal acceptance form on 30 May 2012. The question then is: who are the parties who signed the contract?

Page 9 of the agreement reveals the signatories to the agreement. The name of the excipient was given as the company for whom the "Authorised Representative for Client" was signing. The excipient was also indicated as the client company of the plaintiff. In addition to that, the handwritten "further clauses" to the agreement cite the excipient as the

company that would undertake certain obligations in order for the agreement between the parties to be executed.

Furthermore, at p 7 of the agreement, the excipient is clearly cited as the client for whom services were being rendered at Charter Mine Concession. Clause 3 of the agreement (Scope of Work) indicates that the services by the plaintiff on behalf of the client (excipient) were to be rendered at Charter Mine Concession. That is what took place under the contract. That is what the correspondence between the representatives of the parties confirmed. The liability accepted by Charter Mining Exploration (Pvt) Ltd, who probably ran the operations at Charter Mine Concession, was in respect of services rendered by the plaintiff at the said Charter Mine Concession at the request of its client, namely the excipient – Raven Mining Zimbabwe Limited t/a Charter Mines. The intention of the parties were clear.

In view of the foregoing narration, which was not disputed, the exception has no merit.

Indeed, as correctly submitted by the plaintiff, there was also no dispute over the services rendered by the plaintiff. There was again no dispute over the cost of the services. The defendant merely neglected and refused to pay and hence the issuance of the summons. To that end, I think the submissions by the defendant on the 'special plea' are misplaced. In any case, it is common cause that in matters of this nature the inherent jurisdiction of this court cannot be outsted. To that end, I am in complete agreement with the plaintiff's submission that:-

> "5. ....., there is no obligation to refer a matter to Arbitation unless a dispute has crystaled. (*sic*)
>
> 6. *In casu*, the Plaintiff instituted proceedings in this Honourable Court because the Defendant was *in mora* and not keen on effecting payment. Defendant never disputed the Plaintiff's claim for payment.
>
> 7. In any event the Arbitration clause in the contract is clear that the dispute has to arise from the provision of services. *In casu*, the matter between the parties is not the provision of the services because there is no dispute that the services were provided but in fact the claim by the Plaintiff for payment of the services rendered." See **Withenshal Properties Pty Ltd v Durack Construction Company SA Pty Ltd 1989 (4) SLR 1073**

Indeed in **PTA Bank v Eline Pvt Ltd & Ors 2000 ZLR (1) p156 at p164 A-B** it was held;

> "The Arbitration clauses in the loan agreement and the deed of guarantee cannot completely oust the court's jurisdiction. As I have said earlier, it is only if there is some controversy or dispute that the matter must be referred to Arbitration. Since the PTA Bank merely seeks enforcement of its claims against the Defendant, then it is only right that it should have recourse to the High Court. The Special Plea is dismissed with costs"

I fully agree that this court's jurisdiction cannot be ousted by the arbitration clause relied on, and furthermore, this court can also exercise its discretion to refer the matter to arbitration. I am, therefore satisfied that the special plea by the defendant cannot be upheld.

I therefore order as follows:-

1. Both the Exeption and the Special Plea raised by the defendant be and are hereby dismissed with costs.

Messrs Gill, Godlonton & Gerrans, plaintiff's legal practitioners
Messrs Mawere and Sibanda, defendant's legal practitioners