

CAROL ANN CORREIA
and
CLIFFORD JOHN LIEBENBERG
versus
RICHARD DOLLAR
and
ZIMDIV HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 23 JUNE AND 22 OCTOBER 2015

Opposed application

L. Tshuma for applicants
N. Mashayamombe for respondents

MAKONESE J: Plaintiff instituted action proceedings against first defendant seeking the following relief:

“Delivery of all mining documents and certificates in respect of RHA Tungsten Extension claims held by defendant (first defendant) or by any person claiming right of possession through the defendant within ten days of the granting of the order. The claim arising from the defendants failure to return the said documents notwithstanding demand from plaintiff.”

First defendant entered an Appearance to Defend the action and subsequently second defendant sought to be joined as a party to the proceedings. By consent of the parties second defendant was joined as a party to the proceedings. Defendants have filed a plea in bar challenging the contractual nexus between plaintiff and first defendant and further challenging the jurisdiction of the court on the grounds that the plaintiffs and second defendant irrevocably agreed that the courts of England and Wales had exclusive jurisdiction regarding any claims arising out of the option agreement entered into by the plaintiff and second defendant.

Background

The brief background to this matter is that plaintiffs are the registered titleholders of mining claims known as the RHA Tungsten Extension claims consisting of 40 mining claims. Sometime in March 2011, first defendant purporting to be, or holding himself out to be an agent or proxy of a company known as ZimDiv Holdings Limited offered to purchase the 40 mining claims from the plaintiffs. The purchase of the claims was subject to ZimDiv Holdings exercising an option to purchase on or by 28 February 2014. First defendant requested and received from the plaintiff registration certificates and other ancillary documents relating to the mining claims in order to facilitate the agreement. The documents were surrendered to first defendant for the purpose of “updating the mining claims with the Department of Mines.”

The agreement between the plaintiffs and ZimDiv Holdings collapsed and the option agreement was not exercised. The agreement lapsed on 28 February 2014. Despite demand, first defendant failed or neglected to return the registration certificates in respect of the mining claims to the plaintiffs. That refusal has led to the present action. The first defendant has raised two defences to these claims, namely:

- (a) He was merely acting as an agent and cannot bear personal responsibility for the return of the registration certificates.
- (b) This court has no jurisdiction to entertain the matter in that plaintiff and second defendant entered into a written agreement wherein the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

Plaintiffs contend that their cause of action is premised on the conduct of and the role played by first defendant prior to the signing of the option agreement. Plaintiffs’ declaration in particular paragraph 6, outlines the basis upon which the documents were handed over to first defendant. That particular paragraph reads as follows:

“The documents were surrendered to defendant to update the mining claims with the Department of Mines.”

Plaintiff avers that the cause of action against first defendant is therefore not premised on the terms and conditions of the option agreement, as the handing over of the documents was made prior to the signing of the agreement and first defendant cannot seek to justify holding onto the

certificates on the basis of his role as “facilitator”, and in any event, the agreement itself does not provide for a right by the defendants to hold onto the certificates pending transfer of the claims. Plaintiff contends that first defendant has been properly cited in these proceedings and there is a direct nexus between him and the cause of action and the relief sought by the plaintiffs.

In his Declinatory Plea in Bar first defendant avers that he acted in his capacity as facilitator in the contract between plaintiff and second defendant. He further avers that he acted not as an agent or representative of either of the two parties to the contract. This averment is however contradicted by defendants supplementary heads of arguments wherein in paragraph 3 they assert as follows:

- “3. It is a clear common law doctrine that an agent cannot be held responsible for the actions of his principal.
4. In this case before this Honourable Court, it is a trite fact that, first defendant was an agent who was tasked to locate a seller of mining claims and once found, to collect the mining claims and deliver them to second defendant, his principal, so that it may conduct an appropriate due diligence.”

This apparent contradiction in the position taken by first defendant has not been explained. The first defendant cannot have it both ways. In my view, first defendant’s argument does not hold any water and does not make sense. The plaintiffs delivered the registration certificates to first defendant for the purpose of updating the records with Department of Mines. There is a clear contractual nexus between the plaintiff’s and the first defendant in his personal capacity. The transaction took place well before the option agreement between plaintiffs and the second defendant was entered into. I take the view that the dispute between the parties is centered on establishing whether or not the defendants have a right to retain plaintiff’s registration certificates. This dispute does not in my view, arise out of the performance of the option but arose prior to the signing of the agreement. It is curious to note that whilst the option agreement refers to the performance of due diligence with respect to the mining claims, there is no specific mention of delivery of the registration certificates to the second defendant in the contract itself.

In, *Independence Mining (Pvt) Ltd vs Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 H, CHIDYAUSIKU, J (as he then was) states at page 271 as follows:

“This dispute therefore, is really about the performance of the contract. The arbitration clause covers any dispute arising from the provisions of the agreement. A dispute about the performance, non-performance or inadequate performance of a contract cannot but arise from the provisions of the contract. In my view the fact that the dispute is couched in delictual terms as is the case here, does not affect the issue and is of no consequence. For this reason I have come to the conclusion that the second cause of action also falls within the arbitration clause.”

On the facts of this matter, I am not convinced that the dispute between the parties extends to the provisions and interpretation of the option agreement. In any event, it is noted that the defendants’ special plea in bar is fundamentally flawed in that the dispute sought to be referred to by defendants does not appear *ex facie*, from the pleadings. In the Declinatory Plea, the defendants did not disclose the dispute. The defendants seek to import into the pleadings, the dispute by raising the issue in the heads of argument. This, the defendants may not do, without seeking to amend the pleadings. It is trite that the Declinatory Plea was supposed to be preceded by a substantive plea on the merits. The failure by the defendants to file their substantive plea before raising the plea in abatement is fatal to their case.

In, *Cargill Zimbabwe vs Culverham Trading (Pt) Ltd* HH 42/06 at page 2 of the cyclostyled judgment, MAKARAU, J (as she then was) stated as follows:

“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. It further appears to me that any practice short of this will result in the special plea being prematurely filed.”

In casu, no plea was filed to meet the claim. In the absence of a plea, no dispute arises between the parties.

See also *PTA Bank v Elanne (Pvt) Ltd and Others* 2000 (1) ZLR 156 and *Zimbabwe Broadcasting Corporation v Flanne Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H).

On the basis of the foregoing it is needless for me to make a determination on whether or not this court’s jurisdiction is ousted by the contract between plaintiff and the second defendant. The filing of the Special Plea was premature for the reasons I have already articulated. It is my view that the Special Plea was ill-conceived and cannot stand.

In the result, I make the following order:

1. The special plea is hereby dismissed.

2. The defendants shall meet the costs of suit.

Messrs Webb, Low & Barry, applicants' legal practitioners
Mashayamombe & Co. Attorneys, respondents' legal practitioners