

JOHN FARLEY PIERTERSEN

And

MARK JOHNSTONE

Versus

DURATION GOLD ZIMBABWE (PVT) LTD

And

ALL AFLAME MARKETING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 15 FEBRUARY & 31ST MARCH 2022

Plea in bar

S. Nkomo, for the plaintiffs
L. Nkomo, for the defendants

DUBE-BANDA J: This is plea in bar. The brief background to the dispute is that the plaintiffs issued summons against the defendants on 28 July 2021, claiming cancellation of Joint Venture Agreement (agreement) entered into between plaintiffs and defendants on the 18th December 2021. It is averred that the agreement is in respect of certain mining claims registered in 2nd defendant's name. Plaintiffs avers that defendants have breached the agreement. Plaintiff claims payment by 1st defendant of the sum equivalent to 420.2 kilograms of gold being damages arising out of breach of the agreement by 1st defendant; transfer of the undivided half share of 1st defendant held in 2nd defendant to plaintiffs valued at US\$2 000 000.00 as a set off of the sum due to plaintiffs as damages for the breach of the agreement; and collection commission / costs of suit on an attorney and client scale.

In their declaration plaintiffs aver that on the 18th December 2012, they entered into an agreement with 1st defendant, in respect of mining claims registered in 2nd defendant's name. It is averred that both parties had to contribute to the joint venture, and that the shareholding would be 57.45% for the plaintiffs and 42.55% for the 1st defendant. It is further averred that it was a material term that 1st defendant was to be responsible for exploration of the mining claims and plaintiffs were to be responsible for the management of the joint

venture. It is averred that 1st defendant has breached the material terms of the agreement and as a result plaintiffs have suffered damages.

The application of the law to the facts

Rule 42(1) (a) of the High Court Rules, 2021 defines the purpose of a plea in bar or in abatement, it provides thus:

As an alternative to pleadings to the merits, a party may within the period allowed for filing any subsequent pleadings take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case. (My emphasis).

In Herbstein & van Winsen: *The Civil Practice of the Supreme Court of South Africa* (5th ed.), at p. 598 it is stated that:

A special plea is one that does not raise a defence on the merits of the case, but sets up some special defence which has as its object either to delay the proceedings (dilatatory plea) or to object to the jurisdiction of the court (a declinatory plea) or to quash the action altogether (a peremptory plea). These special pleas do not concern the merits of the action. They merely seek to interpose some defence not apparent on the face of the pleadings.

See: *NEC (Construction Industry) v Zimbabwe Nantong Int. (Pvt) Ltd.* SC 59/2015.

The plea in bar is an alternative to pleading to the merits. It does not target the merits of the dispute. For purposes of completeness and clarity I shall reproduce the grounds of defendants' plea in bar as they appear in the defendants' notice.

The defendants' plead in bar that:

1. Duration Gold Zimbabwe did not enter into a Joint Venture Agreement with the plaintiffs.
2. Duration Gold Zimbabwe did not enter into any agreement with Mark Hageman as stated by the plaintiffs' through their summons and further particulars.
3. Duration Gold Zimbabwe is not a shareholder of All Aflame Marketing (Private) Limited. Duration Gold Zimbabwe cannot therefore satisfy the order sought by the plaintiffs as it does not own any shares in All Aflame Marketing (Private) Limited and did not breach the Joint Venture Agreement raised in the summons and further particulars.

WHEREFORE, the defendants pray that the plaintiffs' claim may be dismissed with punitive costs.

In their replication, plaintiffs aver thus:

In limine

1. Given the matter in which defendants have pleaded in what they term a plea in bar, this matter cannot be determined simply on the basis of the pleadings and heads of arguments. To the extent that the plea in bar largely relates to evidential issues which have not been placed before this Honourable Court. As such the plea in bar is ill advised and ought to be dismissed with costs on a punitive scale.
2. The plea in bar contains a denial of facts as they stand in the plaintiff's declaration which in essence is a complaint on the merits of the case which cannot be dealt with by way of a plea in bar. The objection is therefore fatally defective and ought to be dismissed with costs on a punitive scale.

Ad merits

3. The contractual relationship of the parties was birthed through an agreement of sale of shares in 2nd defendant on the 12th February 2010 which was between 1st plaintiff and 1st defendant. The subsequent agreements including the Joint Venture Agreement all flowed from the agreement of sale.
4. A reading of the said agreements will no doubt show that 1st defendant is a party to the Joint Venture Agreement. Being a party to the Joint Venture Agreement the participated in the agreement with Mark Hageman over the claims registered in 2nd defendant's name.

Ad paragraph 3

The Joint venture Agreement which cancelled the previous agreements between the parties is very clear that 1st defendant "Duration" owns shares in 2nd defendant and has breached all the agreements between the parties.

In their heads of argument defendants argue that 1st defendant did not enter into a joint venture agreement with plaintiffs. It is argued that the whole claim must fail because while 2nd defendant was a party to the agreement (which gives rise to the cause of action) the relief sought can only be satisfied by the shareholders of the 2nd defendant. It is contended that

although 1st defendant exists, it was never a party to the agreement which plaintiffs seek to cancel. It is said 1st defendant is not privy to the agreement alluded to by the plaintiffs in their summons.

Mr *L. Nkomo* counsel for the defendants argued that the substance of the plea in bar is that 1st defendant is wrongly sued in light of the pleaded cause of action. The essence of the plea in bar is that 1st defendant is not a contracting party to the agreement. There is no privity of contract between the plaintiffs and the 1st defendant in respect of the agreement sued upon. In respect of the 2nd defendant counsel argued that no allegations have been made to ground a cause of action against the 2nd defendant, and no substantive relief is sought against this defendant. Counsel argued that there is no cause of action against 1st and 2nd defendants, and further that 1st defendant is not a shareholder in 2nd defendant.

Counsel in trying to demonstrate that the plea in bar has merit, took the court through the plaintiffs' declaration. Again counsel referred to case number HC 1125/21. In HC 1125/21 2nd defendant herein and a company called Competitive Marketing (Pvt) Ltd filed an urgent application against 1st and 2nd plaintiffs herein. The dispute turned on the agreement entered into between the parties. 1st defendant was not a party to HC 1125/21. This court was also asked to consider HC 1851/21. In HC 1851/21 1st and 2nd plaintiffs were the applicants' therein, and 1st and 2nd defendants were there 1st and 2nd respondents therein. HC 1851/21 also seems to turn on this joint venture agreement.

In their heads of argument as well as submissions in court, plaintiffs argued that the plea in bar is ill-taken, in that it is predicated on the denial of the facts as pleaded in the declaration. It is contended that the defendants are drawing this court to deal with the merits of this dispute at this stage of the proceedings. It is argued that defendants have not adduced evidence to support their special plea, and that this court cannot make factual findings as sought by the defendants on the papers before court.

In their declaration plaintiffs' aver that on the 18th December 2012, plaintiffs and 1st defendant who are shareholders of 2nd defendant entered into a written agreement in respect of certain mining claims registered in 2nd defendant's name. It is further averred that it was a term of the agreement that plaintiffs and 1st defendant were to make certain contributions to the joint venture. It is averred that 1st defendant has breached the material terms of the agreement.

I take the view that defendants are raising a defence on the merits of the dispute. The averments that 1st defendant did not enter into a Joint Venture Agreement with the plaintiffs, that it did not enter into any agreement with Mark Hageman, that it is not a shareholder of 2nd defendant, and that it cannot therefore satisfy the order sought by the plaintiffs as it does not own any shares in 2nd defendant and did not breach the Joint Venture Agreement relate to the merits of the dispute.

The replication also raises issues that relate to the merits. The averments that the contractual relationship of the parties started with an agreement of sale of shares between 1st plaintiff and 1st defendant on the 12th February 2010, that the subsequent agreements including the Joint Venture Agreement all flowed from the agreement of sale of shares, that 1st defendant is a party to the Joint Venture Agreement, and that being a party to the Joint Venture Agreement it participated in the agreement with Mark Hageman over the claims registered in 2nd defendant's name, and that the Joint venture Agreement which cancelled the previous agreements between the parties shows that 1st defendant owns shares in 2nd defendant and has breached all the agreements between the parties relate to the merits of the matter.

A plea in bar is an alternative to pleadings to the merits, e.g. *lis pendens*, *res judicata*, lack of jurisdiction, prescription *etc.* In *casu* defendants are pleading to the merits under the guise of a special plea. This is impermissible. The plea in bar is predicated on the denial of the facts as pleaded in the declaration. Plaintiffs argue that the defendants are drawing this court to deal with the merits of this dispute at this stage of the proceedings. I agree with this submission. Further I take the view that HC 1125/21 and HC 1851/21 are not relevant to the resolution of this plea in bar.

Plaintiffs argue that defendants did not adduce evidence to support their special plea, and that this court cannot make factual findings as sought by the defendants on the papers before court. My view is that even if defendants had adduced evidence, such was not going to rescue this plea in bar. I say so because what defendants have placed before court is not an alternative to pleadings to the merits, it is actually a plea founded on the merits. It is a plea on the merits of the dispute.

Mr. *L. Nkomo* argued that there is no cause of action against 1st and 2nd defendants, and 1st defendant is not a shareholder in 2nd defendant. If the contention is that there is no

cause of action the answer is not to file a plea in bar, but an exception in terms of rule 42(1) (b) of the High Court Rules, 2021. See: Herbstein & van Winsen: *The Civil Practice of the Supreme Court of South Africa* (5th ed.), at p. 630. It is for these reasons that this plea in bar must fail.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. Plaintiff sought costs on a legal practitioner and client scale. No case has been made for such an order of costs. I therefore intend awarding costs against the defendants on a party and party scale.

In the result: the plea in bar is dismissed with costs on a party and party scale.

Mathonsi Ncube Law Chambers, plaintiffs' legal practitioners
Coghlán and Welsh, defendants' legal practitioners