

**AFRICA AT LARGE (PRIVATE) LIMITED**

**Versus**

**PETRA COLLEGE**

IN THE HIGH COURT OF ZIMBABWE  
KABASA J  
BULAWAYO 8 AND 23 MAY 2024

**Civil Trial – Special Plea**

*J. Ndubiwa*, for the plaintiff  
*Ms J. Mugova*, for the defendant

**KABASA J:** The plaintiff entered into a contract with the defendant for the construction of two classroom blocks at the defendant's junior and senior schools as well as a single storey 3 classroom block with ablutions at the senior school, a single storey block including a sports office, storeroom, science lab, ablutions and two multi-purpose classrooms at the junior school. The construction was duly completed and the buildings duly handed over to the defendant.

The parties had agreed on the total cost of such construction which amount the defendant paid. However the plaintiff averred that during construction of the said buildings it was subjected to escalations in the price and quantity of goods and construction materials which resulted in an increase in the construction costs. Such escalation was contemplated and provided for in the contract the parties signed.

The variations which were inevitable during construction included:-

- a) The foundation depth which changed from 700 mm to 1 200 mm.
- b) The concrete footing thickness which increased from 230 mm to 350 mm.
- c) The floor slabs which changed from 75 mm to 130 mm.

- d) The senior college which did not have ring beams in the initial drawings but which ring beams had to be installed and reinforced.

Consequently the original cost escalated by US\$68 834.57. The plaintiff wrote to the defendant requesting payment of this amount. The defendant was however not prepared to pay the additional amount.

This stalemate culminated in the issuance of summons in which the plaintiff's claim is for:-

- “1. Payment of the sum of US \$68 834.57 being the value of extra work, materials and escalations incurred by the plaintiff in rendering construction services to the defendant.
2. Interest on the said sum from the date of issuance of summons till payment in full.
3. Costs of suit on a legal practitioner and client scale.”

The summons was issued out of the Commercial Division of the High Court. The rules of the Commercial Division, SI 123/2020 provide that every summons shall be filed together with the plaintiff's declaration and the summary of evidence in Form No. CC 2. This the plaintiff did.

The declaration and the summary of evidence gives details as to how and why there was an escalation of the costs from the original amount. The plaintiff also filed correspondence exchanged between the parties detailing the exchanges regarding payment of the “escalated amount” and the defendant's response towards such claim. The schedule of payments as per the original contract had an amount of US\$337 082.58 which the plaintiff in one of the various communications, acknowledged receipt of.

The defendant's attitude to the request for an additional US\$68 834.57 was also communicated in writing wherein the defendant stated that:-

“According to our record, the total sum of \$376 869 constitutes the full and final payment for this project and no additional payments can and will be made.”

As already alluded to, there being no agreement between the parties, the plaintiff issued summons. The defendant entered an appearance to defend. The entry of appearance to defend was followed by a letter addressed to plaintiff's legal practitioners wherein the

defendant averred that the summons was premature as the parties' agreement per clause 43 thereof provides that whenever a dispute arose between the parties such was to be referred to arbitration. The summons, so defendant contended, ought therefore to be withdrawn failure which the defendant was to raise a special plea. The plaintiff did not budge and the defendant consequently filed a special plea.

The gist of such plea being that:-

“This action is not properly before this Honourable Court, as the parties concluded an Arbitration Agreement appearing in clause 43 of the Agreement attached to the plaintiff's papers, referred to as Document “i.a” under section B of the plaintiff's summary of evidence ...

Plaintiff did not employ the provisions of clause 43 aforementioned, notwithstanding agreement to this effect.

As such, plaintiff's claim has been lodged in the wrong forum, and ought to be struck off, with costs, having been warned of the same by way of a letter attached to defendant's schedule of documents as Annexure “A”

At the hearing of this special plea plaintiff's counsel raised a point *in limine*. Counsel contended that the special plea had been raised prematurely as the defendant has not pleaded on the merits. There ought to be a dispute *ex facie* the pleadings. Without a plea on the merits it is not clear which part of the claim the defendant is aggrieved with, so counsel contended.

In support of this contention, Counsel cited the case of *Cargill Zimbabwe v Culvenham Trading (Pvt) Limited* HH 42-2006 where MAKARAU J (as she then was) said:-

“For a court to stay its proceedings and refer the matter to arbitration there must be a dispute between the parties apparent *ex facie* the pleadings. This appears to me to be a settled position in our law. (See *PTA Bank v Elanne (Pvt) Ltd & Ors* 2000 (1) ZLR 156 (H) and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H).”

The cases cited by the learned Judge enunciated the same point, which is that there must be a dispute between the parties before the court may refer a matter to arbitration.

*Ms Mugova* for the defendant held a different view. Counsel argued that the matter was issued out of the Commercial Division of the High Court, as such litigants are required to

place, from the outset, all relevant facts and supporting documents they rely on in support of their given position. To that end the plaintiff placed before the court all such evidence including the documentary evidence. The defendant equally stated its position when it stated that their position had not changed and the amount already paid included all the work that had been done and no further payment was to be made.

The *Cargill* case was in the general division of the High Court whose rules are different from the Commercial Court rules. The High Court rules, unlike the Commercial Court ones, do not require parties to attach evidence at inception. The facts *in casu* are therefore distinguishable, so counsel argued.

So too in the *Zimbabwe Broadcasting Corporation v Flame Lilly* case, the court asked that the defendant pleads over to the merits so as to ascertain whether there was a dispute and with the filing of that plea the dispute became evident *ex facie* the pleadings. The *PTA Bank v Elanne (Pvt) Ltd* case equally required more in terms of the pleadings to show the existence of a dispute but not so in the case at hand.

Counsel supported this argument from the decision in *Blakey Investments (Pty) Ltd v Delta Beverages (Pvt) Ltd & 2 Ors* HH 388 -23 where MAFUISRE J had this to say:

“ – the Commercial Court can be regarded as some kind of “half-way house” between the strict formalism of the other divisions of the High Court and the liberalism of the alternative dispute resolution mechanisms such as arbitration. The Rules of the Commercial Division have gone some way in giving effect to its ethos, philosophy and character.”

To that end r 12 of the Commercial Division Rules provides for the filing of a plea, exception, special plea or other answer within seven days of service of the plaintiff’s summons.

If a special plea results in the speedy resolution of a matter there is no bar to filing such a plea, so counsel argued.

Whilst the Blackey case (*supra*) is not on all fours with the facts *in casu* regarding the point *in limine* raised by counsel for the plaintiff, the point that it makes regarding the ease of doing business and the need to determine matters in the shortest possible time is apposite.

The issue that has to be resolved here is whether the pleadings as they stand do not disclose a dispute? If they do not then indeed the defendant must plead over to the merits so that the dispute becomes evident, otherwise what is the court expected to rely on in deciding whether to stay the proceedings so as to allow the parties to submit to arbitration? (*Cargill Zimbabwe v Culvenham Trading (Pvt) Ltd, ZBC v Elanne (Pvt) Ltd*).

Given the manner in which pleadings are filed in the Commercial Division, the plaintiff filed all the evidence that would need to be adduced in prosecuting its claim. The defendant took issue with the additional payment plaintiff stated was occasioned by further work that escalated the original costs initially agreed to in the parties' contract. It further asserted that what it had paid was in full and final settlement of its indebtedness having factored all exceptions. This, in my view, spelt out a dispute which would not be any different if the defendant were to be asked to plead over to the merits. Whether such dispute and its resolution necessarily ousts the jurisdiction of the court because of the existence of an arbitration clause is an argument for another day. Is the court supposed to insist on a plea on the merits regurgitating what the defendant has already categorically stated in documents filed by the plaintiff, which documents the defendant confirms and also attached?

I am persuaded by counsel for the defendant's argument. There is a dispute between the parties and such dispute is evident *ex facie* the pleadings. A substantive plea is not, in my considered view, necessary in order to show evidence of a dispute.

The point *in limine* was therefore not properly taken and must fail.

The special plea is yet to be heard and the matter is to be set down for hearing of this special plea.

The issue of costs will fall to be determined at the hearing and conclusion of the special plea.

In the result I make the following order:-

1. The point *in limine* is dismissed for want of merit.
2. Costs shall be in the cause.

*Mashayamombe and Company Attorneys*, plaintiff's legal practitioners  
*Mlotshwa Solcitors*, defendant's legal practitioners