

CARGILL ZIMBABWE
versus
CULVENHAM TRADING (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 22 and 29 March 2006

Opposed Application

Mr *Ranchod*, for defendant
Mr *Zhou*, for plaintiff

MAKARAU J: On 28 December 2004, the plaintiff and the defendant entered into a contract for the sale and purchase of cotton seed on certain terms and conditions. It was a specific term of the agreement that in the event of any dispute of whatever nature arising in connection with the agreement, such dispute would be referred to arbitration in terms of the Arbitration Act [*Chapter 7.02*].

On 3 February 2006, the plaintiff issued summons in the above matter claiming the sum of \$1 645 240 500 from the defendant, being the alleged balance of cotton seed and jute bags delivered. An appearance to defend the claim was timeously filed. When the defendant was put on notice to file its plea or other answer to the plaintiff's claim, it filed a special plea, seeking an order staying proceedings and for the matter to be referred to arbitration in terms of the clause described above.

The special plea was resisted by the plaintiff on the basis that there is no dispute between the parties.

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 & Others* 2000 (1) ZLR 156 (H) and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448 (H)).

In the earlier case, Smith J dealt with a situation where a plea in abatement was taken before a plea on the merits had been filed in the matter. He then ruled that there was no evidence of a dispute between the parties. A substantive plea was then filed raising certain defences to the claim. In upholding the special plea, the learned judge was

satisfied that from the plea filed by the defendant in that matter a dispute in connection with the agreement was apparent.

In the *PTA Bank* case, the same judge, reviewed a number of texts and decided cases on the issue and held that there must be a dispute between the parties before the court may refer a matter to arbitration. I am much persuaded by the observation by the authors Butler & Finsen in *Arbitration in South Africa Law and Practice* cited by SMITH J in his judgment that:-

“Arbitration is a process for resolving a dispute between the parties regarding their existing rights. The requirement of a dispute is used to distinguish arbitration from certain other contractual provisions for referring matters to a third party..... Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to render an arbitration agreement enforceable and to establish the arbitrator’s jurisdiction.”

Thus, where there is no dispute arising in connection with the agreement between the parties, there can be no basis for submitting the matter to arbitration. The issue that then arises is how, for the purposes of the court referring the matter to arbitration, evidence of the dispute is to be presented.

In my view, 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 the entry 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 the 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. It further appears to me that any practice short of this will result in the special plea being dismissed as having been prematurely filed.

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

Mr *Ranchod* for the defendant expressed the fear that if the defendant filed a substantive plea in the matter, he would have submitted to the jurisdiction of the court.

With respect, the defendant is always subject to the jurisdiction of the court. It is only the proceedings that are stayed pending referral of the dispute to arbitration. An arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to compliment the court process in resolving disputes by engaging in an alternative dispute resolving process but remains under the control of the courts.

Secondly, it is my view that the filing of a plea on the merits of the matter does not bar the defendant from simultaneously or thereafter raising the special plea seeking referral of the matter to arbitration.

On the basis of the foregoing, it is my view that the defendant's special plea cannot stand. It is premature.

In the result, I make the following order:

1. The special plea is dismissed.
2. The defendant shall meet the costs of the plaintiff.

Wickwar & Chitiyo, the plaintiff's legal practitioners
Hussein Ranchod & Company, the defendant's legal practitioners