GALAXY ENGINEERING DESIGN
CONSULTANTS (PRIVATE) LIMITED
versus
GREAT ZIMBABWE UNIVERSITY
and
PROSTRUCT ENGINEERING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 25 November 2016 & 22 May 2017

Opposed Matter

Adv *Zhuwarara*, for the applicant
Adv L Mazonde, for the first respondent

CHIWESHE JP: On April 19 2016 the applicant issued summons against the respondents, claiming as against the first respondent, the sum of US$ 4, 660 117.49 being the amount due and payable in respect of work carried out by it at first respondent's main campus at Masvingo. It also claimed interest on that sum at the prescribed rate plus costs of suit on a legal practitioner and client scale and collection commission calculated in terms of the Law Society By Laws of 1982 as amended by SI 157 of 2014.

The background facts to this matter are summarized by the applicant in its declaration as follows:

In January 2013 the applicant and the second respondent entered into an agreement with first respondent in terms of which the first respondent commissioned the applicant and the second respondent to carry out civil engineering work for the drawing and design of a project for the construction of various buildings at the first respondent's main campus in Masvingo. The applicant and the second respondent were to jointly provide the required services, the work being shared equally between them and the fees due on account of the invoiced work were to be shared equally between them. At each phase of the works invoices were raised which the first respondent was obliged to pay upon delivery in terms of the parties agreement.

In terms of the agreement, in the event of litigation the applicant would be entitled to claim its legal costs on a legal practitioner and client scale together with collection commission.

The second respondent has been cited only for purposes of information and as an interested party. It is pursuing its remedies against the first respondent independently and separately from the applicant.

After completion of the works, the applicant and the second respondent submitted all the invoices to the first respondent for payment. The total sum involved was US$9, 239 059.45. The applicant seeks to recover its half share of that amount, the sum of US$4, 660 117.49. Despite demand, the first respondent has failed to pay this amount. It filed appearance to defend and despite the clarity of the terms of the agreement and the applicant's clear and unambiguous case, it has needlessly sought in order to plead, further particulars and when so provided with such, it has sought further and better particulars! When these were furnished the first respondent filed a special plea contending that the applicant is obliged, in terms of clause 15 (2) of the agreement, to refer the matter to arbitration. For that reason, argues the first respondent, the applicant was not properly before the court and that the court has therefore no jurisdiction to entertain the matter. It also raised an exception on behalf of the second respondent! The exception has since been withdrawn. It urges the court to uphold the special plea and dismiss the applicant's claim with costs on the higher scale.

The applicant avers that the special plea has been taken in bad faith. It states that no dispute has been alleged or proved by the first respondent. The plain facts which have not been disputed are that services were provided but the first respondent has failed to pay for the services. I agree with the applicant that a failure to pay for services rendered cannot be classified as a dispute that should be referred to arbitration. It is not the kind of dispute contemplated by the parties in terms of clause 15.2 of their agreement. In any event clause 15.1 of the same requires that the parties proceed to mediation first, then if the dispute is not so resolved, the parties may seek arbitration. I find that there is no dispute between the parties that can be referred to either mediation or arbitration. A dispute in that context must be one that goes to the root or substance of the contract. Indeed clause 15 (2) of the agreement is indicative. It provides *inter alia* as follows:

> "….., the parties shall refer any dispute arising out of the agreement or concerning its interpretation, its validity or the enforcement of any rights obligations thereunder to arbitration……"

The truth of the matter is that services were rendered at an agreed price. At some stage the first respondent sought to negotiate a payment plan, a clear indication that it had accepted liability for the sums claimed. First respondent has not disputed that it had sought that indulgence from the applicant, nor does it deny liability as claimed. The applicant only resorted to litigation when it became clear that the first respondent would not return to it with the payment proposals and that all first respondent sought to do was to buy time. The present proceedings are a continuation of that ploy, to delay the inevitable. I agree with the applicant that the first respondent has abused court process in a case in which it has absolutely no defence. The special plea must therefore be dismissed with the contempt it deserves.

Accordingly it is ordered as follows:

1. The special plea be and is hereby dismissed.
2. The first respondent shall pay the costs on a legal practitioner and client scale.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners