

MANIFEST SECURITY (PRIVATE) LIMITED
versus
ZESA HOLDINGS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 14 October 2022 & 15 January 2024

Opposed matter-Special Plea

Mr *L C Ndoro*, for the plaintiff
Mr *C J Mahara*, for the defendant

MUSITHU J: On 3 November 2021, the plaintiff instituted summons proceedings against the defendant claiming damages in the sum of US\$36 660.00, arising from a breach of contract signed by the parties. The plaintiff also claims interest at the prescribed rate calculated from the date of service of summons to date of full payment, plus costs of suit.

The brief background to the plaintiff's claim is as follows. On 28 December 2020, the parties entered a written contract in terms of which the plaintiff was required to provide security guard services to the defendant. The contract was signed following the floating of a tender by the defendant for the provision of security services under reference number ZH/RFP/13/2020. In terms of clause 6 of the contract, the plaintiff was required to provide the services at eleven (11) sites assigned by the defendant. The monthly charge for all the sites was ZWL \$439 696.21, which was equivalent to US\$5 405.00.

The plaintiff claims that the defendant breached the agreement between the parties by assigning only five sites at which the services would be rendered instead of eleven. According to the plaintiff, the remaining six sites that were not availed had a contract price of US\$36 660.00, which would have been paid for a period of twelve months. Because of the defendant's breach, the plaintiff avers that it suffered damages in the sum of US\$36 660.00, being the amount that it would have earned from the provision of security services at the said six sites.

In response to the plaintiff's claim, the defendant's raised a special plea and also pleaded to the merits of the claim. The special plea raised two defences. The first was that the relief sought by the plaintiff was incompetent. This was because the plaintiff's claim was couched in United States dollars, instead of the local currency. The transaction between the parties was a domestic one. The contract between the parties was denominated in local currency. The position of the law was that monetary obligations in respect of such transactions had to be settled in local currency. The claim was therefore bad at law and had to be dismissed.

The second preliminary point was that the court had no jurisdiction to hear the matter. This was because in terms of the same contract, any dispute arising therefrom had to be referred to arbitration. The plaintiff had rushed to court before exhausting the available domestic remedies. The court was urged to dismiss the claim with costs on the higher scale.

In its replication, the plaintiff admitted that although the claim was based in United States dollar currency, that amount was payable at the prevailing interbank rate. The plaintiff had since issued a notice to amend its claim in that regard. The claim was therefore properly before the court.

Concerning the question of jurisdiction, the plaintiff denied that the court had no jurisdiction to hear the matter. It averred that no evidence was placed before the court to enable the court to decide whether the arbitration clause constituted an arbitration agreement or not. It further denied that the arbitration clause had the effect of ousting the jurisdiction of the court. An arbitration clause only had the effect of staying proceedings. In the event that the court was persuaded that the clause constituted an arbitration agreement, then the court proceedings could be stayed pending the arbitration proceedings.

The Submissions

The defendant's heads of argument were issued and filed on 8 December 2021, while the plaintiff's heads of argument were issued and filed on 20 December 2021. On the same day, the plaintiff also caused to be issued and filed a notice of amendment to the summons and declaration as well as its replication to the defendant's plea. In his oral submissions, Mr *Mahara* for the defendant submitted that the defendant was persisting with the special plea despite the notice of amendment filed by the plaintiff. This was because the plaintiff had not complied with r

41(5) of the High Court rules, and accordingly no amendment had been made to the summons and declaration.

In its heads of argument, the defendant submitted that Statutory Instrument 212 of 2019 (the Instrument), made it unlawful for commerce to be conducted in any other currency other than the local currency. Section 3(1) of the said instrument provides for the exclusive use of the Zimbabwean currency for domestic transactions. That section provides that no person who is party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar. The same instrument defines domestic transaction in s 2(1) to mean any transaction within Zimbabwe whereby goods or services are offered for sale or attempted to be offered for sale. In the furtherance of its argument that the plaintiff's claim ought to have been made in local currency, the defendant cited the case of *Breastplate Service (Private) Limited v Cambria Africa PLC*, which further dealt with the issue of domestic transactions in terms of the said instrument.

In response, Mr *Ndoro* for the plaintiff submitted that the issue about the amendment to the claim was for the trial court to deal with. The issue before the court called for the interpretation of the contract at the trial stage, and not at this stage of the proceedings. Counsel further submitted that the plaintiff was not barred from making an amendment to its claim at this stage of the proceedings.

In its heads of argument, the plaintiff admitted that the contract created domestic obligations in terms of which payments were to be settled in local currency. Though the plaintiff's claim was denominated in the United States dollar currency, it was still going to be settled in local currency at the prevailing interbank rate. The plaintiff further submitted that at any rate, the fact that the plaintiff's claim was denominated in United States dollars did not nullify the proceedings. It was an issue for the merits. It called upon the court to determine whether the obligation was a local one or not. The point had therefore been raised prematurely.

As regards the second preliminary point Mr *Mahara* submitted that clause 17 of the General Conditions of Contract contained an arbitration clause which required the parties to submit themselves to arbitration in the event of a dispute. He further submitted that from a reading of the clause, it was mandatory that the parties submit themselves to a negotiation process which was then followed by the referral of the matter to arbitration. Counsel further

submitted that the use of the word “may give notice” in clause 17.2 of the contract did not necessarily mean that the arbitration clause was not binding. The word “may” as used in the clause was just confined to the giving of notice by either party intent on referring the matter to arbitration.

In response, Mr *Ndoro* submitted that from a reading of the clause, it was clear that arbitration was not mandatory. Counsel cited the remarks of TAKUVA J in the case of *Olcraft (Pvt) Ltd t/a Flora Unlimited v FC Platinum & Another*¹, where the learned judge held that the use of the term “may” instead of “shall”, in the wording of what the parties construed as the arbitration clause, meant that the jurisdiction of the court was not ousted.

The Analysis

Whether this court has jurisdiction to hear this matter

The court must determine at the onset whether it has jurisdiction to deal with this matter. The court can only hear the matter once it is satisfied that its jurisdiction was not ousted by the arbitration clause as submitted by Mr *Mahara*. The issue to be decided is whether clause 17 of the contract, which the defendant considers to be the arbitration clause, is couched in such a manner that has the effect of ousting the jurisdiction of the court. That clause reads as follows:

“17. *Settlement of Disputes*

- 17.1 The Procuring Entity and the Contractor shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them or in connection with the Contract or its interpretation.
- 17.2 If, after twenty-eight (28) days, the parties have failed to resolve their dispute or difference by such mutual negotiation, then either the Procuring Entity or the Contractor may give notice to the other party of its intention to commence arbitration under the Arbitration Act [*Chapter 7:15*], as amended.” (Underlining mine)

It is the words “may give notice”, that appear to be the source of confusion herein. Mr *Mahara* for the defendant insisted that those words were merely confined to the giving of notice, but they did not detract from the need to refer the dispute to arbitration. Mr *Ndoro* for the plaintiff argued that those words effectively meant that the parties had discretion on whether to refer dispute to arbitration or not.

Arbitration proceedings in Zimbabwe are regulated by the Arbitration Act². The exception is with respect to those matters arising from employment disputes that are governed by

¹ HH 529/15

² [*Chapter 7:15*]

the Labour Act. Article 7 of the Model Law which is incorporated into the Arbitration Act defines an arbitration agreement as follows:

“Article 7

Definition and form of arbitration agreement

(1) “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.”

The above law does not define what an arbitration clause is, save to identify it as one of the avenues through which an arbitration agreement may be formulated. In simple terms then, an arbitration clause is a clause in a contract in terms of which the parties agree to resolve their disputes through the arbitration process. Courts have the constitutional mandate to resolve disputes between parties in keeping with principles of the rule of law. However, the constitution now embraces other tribunals that are also endowed with powers to resolve disputes through the alternative dispute resolution procedure.³ It follows that an arbitration clause must be couched in such a manner that leaves no doubt that the intention of the parties was to have their disputes settled through the arbitration process instead of the court route. It must never be the subject of conjecture whether parties intended to have the jurisdiction of the court ousted. After all it is the parties’ contract, and they must decide for themselves how they want their disputes resolved.

From a reading of clause 17, I find nothing in it that suggests that it was the intention of the parties to oust the jurisdiction of the courts. The words “may give notice” suggest to me that either party could elect to give notice of its intention to commence arbitration under the Arbitration Act. What would then happen if neither party elected not to give the said notice? The parties would remain seized with the same dispute. The giving of notice must of course be preceded by the mutual negotiation process. The clause does not say that either party is precluded from approaching the courts after the failure of the negotiation process. As already stated, it must be clear from the wording of the arbitration clause that arbitration is the sole avenue through which disputes must be resolved to the exclusion of the courts. For the foregoing reasons, I determine that there is nothing in the way clause 17 is framed that has the effect of ousting the jurisdiction of the courts. The preliminary point is devoid of merit, and it is hereby dismissed.

³ See s 174 (1)(d) of the Constitution

Whether the plaintiff's claim is competent

It is critical to decide at the outset whether the amendments allegedly made by the plaintiff to its claim were properly made as this has a bearing on this preliminary point. Rule 41 of the High Court rules deals with the amendment of pleadings and matters arising pending action. Rules 1 to 5 are relevant to the determination of this issue. They provide as follows:

“41. Amendment of pleadings and matters arising pending action

(1) Any party wishing to amend a pleading or document other than a sworn statement, filed in connection with any proceedings shall, notify all other parties of his or her intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is filed and delivered within ten days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall state clearly and concisely the grounds upon which the objection is based.

(4) If an objection which complies with subrule (3) is filed within the period set out in subrule (2), the party desiring to amend may, within ten days, lodge an application for leave to amend.

(5) Where no objection contemplated in subrule (4) is filed, every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within ten days after the expiration of the period mentioned in subrule (2) effect the amendment as contemplated in subrule (7).”

The notice of the intention to amend the summons and declaration was supposed to give the defendant ten days within which to make a written objection to the proposed amendment. The notice herein did not invite the defendant to make such objections as required by the rules. If no such objection was made to the proposed amendments, then the defendant would be presumed to have consented to the amendment. The party who gave notice of the proposed amendment may within ten days after the expiration of the period within which an objection to the proposed amendment ought to have been made, effect the amendment in terms of subrule 7. Sub rule 7 states that:

“(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by filing each relevant page in its amended form:

Provided that, where the amendments are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, copies of the pleadings as amended shall be filed.”

In my view, sub rule (5) must be read together with sub rule (7). In other words, where no objections to the proposed amendment have been received, the party that wishes to effect that

proposed amendment must still comply with subrule (7). From my reading of the said provisions, a proposed amendment does not just end with the service of the notice of the proposed amendment on a party. That process must be completed with the making of the amendment in the manner set out in sub rule 7. I therefore find merit in the defendant's submission that no amendment was made to the summons and declaration.

It occurs to me that the proposed amendment may have been an afterthought by the plaintiff. This is because the defendant's plea was issued and filed on 25 November 2021. The defendant's heads of argument were issued and filed on 8 December 2021. Both the plea and the heads of argument raised the issue of the impropriety of denominating the claim in the United States dollar currency. The plaintiff's notice of amendment, the replication and the heads of argument were all issued and filed on the same day on 20 December 2021. If the plaintiff was indeed serious about making the amendment to its claim, then it should not have waited to do so on the same day it filed its replication and heads of argument.

The next issue is whether it was improper for the plaintiff to denominate its claim in the United States dollar currency. The court's attention was drawn to the provisions of the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019, promulgated as Statutory 212 of 2019. It is instructive for me to reproduce the provisions of the said instrument that were cited by the defendant's counsel. Section 3 (1) states as follows:

“Exclusive use of Zimbabwean currency for domestic transactions

3. (1) Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar”

As already noted, the instrument defines domestic transaction to include any transaction within Zimbabwe whereby goods or services are offered for sale or attempted to be offered for sale. The nature of the transaction between the plaintiff and the defendant is not one of those excluded from the scope of domestic transactions in terms of s 4 of the instrument. In the *Breastplate Service (Private) Limited v Cambria* matter the Supreme Court made the following comments on the said instrument:

“The term “domestic transaction” is very broadly defined in s 2(1) of the Regulations, subject to s 4, to encompass virtually every conceivable commercial transaction within Zimbabwe. Section 3(1), which is also subject to s 4, expressly prohibits the payment or receipt of any currency other than the Zimbabwe dollar, as the price or consideration payable or receivable in respect of any

domestic transaction. Section 4 enumerates those transactions which are excluded from the scope of the definition of “domestic transaction”.

The plaintiff’s claim as presently couched would fall foul of s 3 of the Instrument as read with the definition of domestic transaction in s 2(1) thereof. Section 3(3) of the Instrument makes it an offence for one to contravene s 3(1). The plaintiff’s claim makes it clear that the sum of US\$36 660.00 was the contract price for the remaining six sites for a period of twelve months. The amendments that the plaintiff sought to make had the effect of adding the words “payable at the prevailing interbank rate” to part (a) of the plaintiff’s claim on the summons and to part (a) of the prayer to the declaration. I can only assume that the proposed amendment was triggered by the realization that the claim as presently pleaded in the summons and declaration was not competent in view of the provisions of the Instrument.

It is for the foregoing reasons that I determine that there is merit in the defendant’s preliminary point. The plaintiff’s claim is not properly before the court and must be struck off. That being the case it becomes needless to traverse the merits of the matter.

COSTS

The defendant’s counsel urged the court to dismiss the plaintiff’s claim with costs on the punitive scale in the event of the court finding in favour of the defendant. Punitive costs are awarded in exceptional circumstances where the conduct of the parties or the way in which litigation was conducted calls for the censure of a litigant through an award of costs on the punitive scale. The circumstances of this case do not justify an award of costs at that scale.

Resultantly, IT IS ORDERED THAT:

1. The plaintiff’s claim is hereby struck off the roll.
2. The plaintiff shall pay the defendant’s costs of suit.

Thondhlanga & Associates, plaintiff’s legal practitioners
Muvingi & Mugadza, defendant’s legal practitioners