TATENDA GEORGE MANDUNA
versus
ALLIANCE INSURANCE (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 26 October 2015 & 24 February 2016

Civil trial- Special plea- Arbitration clause

O. D Mawadze, for the plaintiff
R Jambo, for the defendant

MUSHORE J: The facts of this matter are these. On 1 February 2013, the plaintiff insured his vehicle against the risk of fire, accident and loss through the defendant company, by way of a comprehensive insurance policy. In terms of the insurance policy, the plaintiff was to receive full cover for his vehicle, a Volvo S60, subject to the payment of his monthly premium. The plaintiff informs that sometime in April 2013 he was involved in a motor car accident at a roundabout at Warren Park along the Harare and Bulawayo Road and that as a result of the accident his motor vehicle was damaged beyond repair. According to the plaintiff he reported the accident to the police at Warren Park Police station resulting in an investigation into the accident. The police carried out an investigation into the accident and having concluded that plaintiff was responsible for the accident they caused the plaintiff to pay a deposit fine of US$200-00 for driving without due care and attention. Shortly thereafter, the plaintiff lodged a claim with the defendant company claiming payment of the sum insured arising from accident damage which according to the plaintiff was in the amount of US$ 11,000-00. The plaintiff tells us that the on 3 May 2013 the defendant accepted the plaintiff's claim and generated a loss acceptance form in order to compensate the plaintiff in the sum of US$ 9,000-00. However apparently when the funds failed to arrive and reach the plaintiff's account it was then that that plaintiff enquired with the defendant as to when

payment would be made. The defendant then made it known to the plaintiff that it had no intention of settling the plaintiff's claim.

Factually, the defendant on the other hand presented a very different version of the events surrounding the plaintiff's claim. It was the defendant's case that when then the plaintiff lodged a claim for compensation for the loss, the defendant as usual conducted its own investigation and that it was then that the defendant declined payment of the sum to the plaintiff citing that it had formed the view that the plaintiff's claim may be fraudulent in that the plaintiff had conspicuously failed to make known the place where the accident was alleged to have taken place. In fact the position which the defendant made known to the plaintiff was that in the circumstances it was not under any lawful obligation to compensate the defendant for his loss.

The plaintiff however remained convinced that he ought to be compensated by the defendant for hiss loss and so he instituted the current legal proceedings against the defendant. The defendant has opposed the action and filed a joint special plea and the plea on the merits. The matter was placed before me for trial.

On the trial date, the defendant presented his preliminary argument on the special plea taken. The thrust of the defendant's special plea as pleaded was that in terms of the Policy Document which specifically dictates the terms of the agreement between the parties, and in particular Clause 14 thereof, the plaintiff has no right of action against the defendant. Clause 14 of the Policy Document is framed as follows:-

> "Should any difference arise between the Company and the Insured as to the amount of any claim under this policy the same shall be referred to arbitration in accordance with the Statutory provisions for the time being in force applicable thereto, and the obtaining of any award shall be a condition precedent to any right of action against the Company"

By filing and moving the special plea, the defendant is resolute in its thinking that the plaintiff has approached this court prematurely because the plaintiff's claim in this case is essentially one which falls under the purview of Clause 14 resulting in the matter being one for determination by way of arbitration. To this end the defendant is of the opinion that because the current dispute pertains to "the amount of any claim" then the arbitration clause should compel me to refuse to entertain the matter and to refer it first to arbitration. Thus the defendant has confined itself to an interpretation of Clause 14 to render this matter as being improperly before me at the first instance.

The plaintiff on the other hand has raised a legal argument in seeking to dissuade me from upholding the Special Plea. The plaintiff argues that even in the face of there being an arbitration clause in an agreement such as the one *in casu*, because this court enjoys inherent jurisdiction then this court ought to entertain the matter without it being referred to arbitration because this court is not bound by the 'submission' (sic) clause. I take it that what the plaintiff meant to put across in using the terminology "submission" clause is that he meant that this court need not be bound by a clause calling upon the parties to submit to the jurisdiction of an arbitrator. The plaintiff's reasoning is skewed for the following reasons:-

Firstly, this court is not bound by the 'submission' clause. It is the parties who bound themselves to the arbitration agreement when they entered into the contract of insurance.

Secondly this court entered the fray with respect to the likelihood of having to make a determination on the arbitration clause when the defendant filed its Special plea.

Thirdly because of sanctity of contract, the plaintiff cannot as of a right insist that this court must impose its inherent jurisdiction on this dispute and simply override its obligation to peer into the efficacies of the reference to arbitration simply because the plaintiff chose to file a suit in this court. The whole point of filing a special plea is that the defendant is voicing its objection to the plaintiff's choice of forum for which the defendant requires a determination.

Fourthly this court is seized with a deliberation on the points raised in the special plea first because it is only if the court finds that a reference to arbitration may run contrary to the justice of the matter, that this court will invoke its inherent jurisdiction.

Fifthly, an arbitration agreement does not oust the inherent jurisdiction of this court and therefore it cannot be concluded that a litigant who files a special plea is intent on trying to exclude this court from exercising its inherent jurisdiction.

I am emboldened in my reasoning because ample judicial precedent exists on this point which is aligned with my view.

Mafusire J's *dicta* in *Conplant Technology [Private] Limited* v *Wentspring Investments [Private] Limited* HH 965/15 is instructive. In that case, (which was a court action) the defendant filed a special plea in which it relied on an arbitration clause which ousted the jurisdiction of the High Court where *'any dispute'* had arisen and required determination. The defendant, who pleaded that the matter should first be referred to arbitration, filed a special plea to that effect. The learned Judge had a far more complicated task than the task at hand here, but be that as it may the principles expounded by him in that

case are aligned to those occurring in the current case. In that case the learned Judge referred to the Arbitration Act [*Chapter 7:15*] in his deliberations and in particular Art 8 [1] of the Model Law, First Schedule to the Arbitration Act [*Chapter 7:15*]. Article 8 [1] which states:

> "A court of law before which proceedings are brought in a matter which is subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed"

The learned Judge agreed with the defendant and determined that the parties' first port of call was to defer the matter to arbitration. He premised his decision from an understanding of the binding nature of such clauses to the parties to a contract when he said:-

> "In my view and in my own words, it is now settled that a clause in a contract to refer a dispute to arbitration is binding on the parties. A party is not at liberty to resile from that clause at any time he may wish to do so. In terms of Article 8 of the Arbitration Act, where a party makes a timeous request for referral to arbitration, the court has to stay the matter and refer the dispute to arbitration unless the agreement is null and void, or is inoperable or is incapable of being performed."

In *Bitumat Ltd* v *Multicom* HH 142/2000 the learned Smith J's opinion and decision with respect to the application of arbitration clauses is that they ought to be observed if the parties have entered into an agreement with an arbitral court.

Makarau JP [as she was then] made the same observation in *Shell Zimbabwe (Pvt) Ltd* v *Zimsa (Pvt) Ltd* 2007 (2) ZLR 366 when she simply said at p 370:

> "Thus in my view, while the court is bound to give effect to arbitration clauses in agreements, it is not bound to do so in circumstances where arbitration is not the expressed or implied first choice dispute resolution mechanism of the parties".
>
> In the current case the plaintiff and the defendant clearly bound themselves to the terms of the policy document and in so doing elected the arbitration route in circumstance where a dispute has arisen with respect to "the payment of any amount"

Now I have perused the clause 14 itself (in the current matter) and formed my own opinion as to what was intended by the parties when they contracted and quite simply and within my understanding of Clause 14 as it appears on the Policy document itself, the parties intended that if a difference were to arise which concerns the amount of any claim, then and in that event the parties should first proceed to arbitration for a determination of the dispute. The language used and its meaning is simple, and is not confusing nor is it shrouded in mystery. Therefore it seems to me to that the arbitration clause is relevant to the current set of facts.

I turn now to a further point raised by the plaintiff in his heads of argument.

In the alternative, the plaintiff seeks to dissuade me from allowing a stay of the proceedings on the basis that the even were the arbitration to proceed, the matter would still have to be further ventilated by way of court action before it is ultimately disposed of. By this the plaintiff seems to me to be saying that if I were to refer the matter to arbitration then in so doing I would be prolonging the speedy dispensation of this case because the parties would still have to proceed with the matter in this court. I have difficulty comprehending the point taken by the plaintiff because it seems to me that if the matter were to proceed to arbitration, the arbitrator's decision would result in a pronouncement on liability which would not have to be canvassed in this court thereafter.

There have been instances where the court has exercised its judicial discretion in favour of the matter continuing in court without reference to arbitration but that is because the justice of the matter called for that.

In *Yorigaami Maritime Construction* v *Nissho-Iwal* 1977 (4) CPD 682, the arbitration clause required the parties to proceed to arbitration in Japan. Basically the claim before the court was one of damages and the assessment of such damages. In determining the Special Plea taken, the court favoured overriding the reference to arbitration and instead insisted on hearing the dispute locally in Cape Town. This was because the court recognised that it would not be efficacious for the matter to be heard in Japan. The shipping vessels which founded jurisdiction were docked in Cape Town. Investigations as to liability were to take place in Cape Town and all the witnesses were resident in Cape Town.

Further, the expert witnesses could never be compelled to testify in Japan.

Thus it being obvious that the justices in the matter would be compromised by a reference to arbitration in Japan, all the above factors weighed in favour of the court exercising its inherent jurisdiction to hear and determine the matter.

In the result, and in applying the reasoning expounded to in the *Yorigaami* case to the facts of this case, I cannot find any reason (neither has one been pleaded) to conclude that plaintiff would be prejudiced in the conduct of his case where I to allow the Special Plea taken and thus refer the matter to arbitration. Such a reference would not be prejudicial to the just dispensation of the plaintiff's claim. It is my finding that it was appropriate for the defendant to file and move the Special Plea.

I will now go slightly off-topic to comment upon a factual observation which I made when reading the papers which I feel deserves mention. In the plaintiff's pre-trial conference

minute the plaintiff referred to clause 14 and imputed his understanding of the clause itself with particular emphasis on what the plaintiff deemed to be the most significant portion of it. When I peered closely at the minute filed by the plaintiff, I realised that the plaintiff had erroneously and/or negligently read the salient part of the clause as being,

> "A. ISSUES
>
> The plaintiff submits that the issues for the trial court in this matter are as follows:-
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> i. Whether or not a claim for breach of insurance contract (*sic*) and a claim for full cover/compensation of the comprehensively insured motor vehicle can be said to be an 'amount of '**the'** claim' *in toto* as opposed to a claim of a party thereof? In other words whether the dispute between the parties relates to the "amount/*quantum* of the claim *per se*.
> ii. …….*etc*."{My underlining}

Now looking at Clause 14 itself and paraphrasing it, it does not read in the manner that the plaintiff explains. In fact the clause under scrutiny as pleaded by the defendant in its special plea reads as follows:-

> "SPECIAL PLEA.
>
> 1. The plaintiff does not have a right of action against the Defendant. The insurance policy based on which the Plaintiff is insured by the Defendant and based on which the Plaintiff sought to institute the present proceedings clearly provides under clause 14 of the conditions that:-
>
> "Should any difference arise between the Company and the Insured as to the amount of '**any**' claim under this policy shall be referred to arbitration in accordance with the statutory provisions for the time being in force applicable thereto, and the obtaining of any award shall be a condition precedent to any right of action against the company." {My underlining}

In other words the plaintiff wrongly substituted the word **"any'** with the word **'the'**.

Even though the plaintiff incorrectly recorded the clause in this matter, the discord between the parties would still pertain to "the amount of claim", or put differently, what amount, if any, the defendant would be obligated to pay to the plaintiff.

Returning to plaintiff's objections, the plaintiff took another point. In the plaintiff's words he argued as follows:-

> "It is further submitted that in suspending a pending matter before it, there must have been a proper application for stay of proceedings for consequential reference to arbitration by a party who alleges that the matter is one that is arbitrable (sic) in the arbitration tribunal as *per* agreement of the parties. Filing heads of argument on the special plea of arbitration is not such application as there are only three ways in which applications can be done in our law, that is in terms of Order 32 Rule 226 of the High Court of Zimbabwe Rules, oral applications done during the course of the hearing or as common law applications. The defendant had

> simply filed its heads of argument s on the special plea, and had not made an oral application for a stay of proceedings on the grounds that the matter had to be referred to arbitration. Accordingly the special plea is not properly before the court and ought to be dismissed"

If the plaintiff is saying that the defendant ought to have made a special oral application for the action to be stayed prior to applying for the special plea to be granted, then I disagree with the plaintiff. The effect of the defendant having filed and taken the special plea is that where the determination favours the defendant, then and in that event the proceedings are effectively stayed. I had already mentioned that at the commencement of the trial the defendant applied that the Special Plea be determined. I directed the parties to submit Heads of Argument and that is how both parties filed their respective arguments with the court. In my view there is no need for a litigant taking a special plea to first argue for a stay and then ask the court to consider the special plea. The point taken is illogical and frankly disingenuous. The plaintiff needs to be disabused of the notion that the special plea is not properly before the court. Order 21 r 138 states:

> "138. Procedure on filing special plea, exception or application to strike out
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> When a special plea, exception or application to strike out has been filed-
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> (a) The parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
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> (b) Failing consent either party may within the further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223;
>
> (c) Failing such consent and such application, the party pleading specially, excepting or applying shall within a further period of four days plead over the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial."

All that the defendant was required to do to give the court notice that it was taking a special plea was simply to file a special plea, which it in actual fact did. By so filing the special plea, the defendant gave the plaintiff notice of the point it intended to take. If the plaintiff reasonably apprehended that the special plea taken was intended to waylay the requirement that there be finality to litigation, then the plaintiff ought to have exercised his prerogative to set the matter down as envisaged in r 138 (b). The plaintiff is in no position to complain about the special plea not having been dealt with prior to the trial date because the plaintiff neglected to utilise his option to bring about an earlier determination of the special plea by invoking r 138 (b). The plaintiff did not do so and therefore the scenario envisaged in r 138 (c) came about and clearly then the matter would only be resolved at the trial hearing

which is what happened. In fact the parties both agreed in their joint pre-trial minute filed of record on 5 February 2015 that the first issue to be tackled was an adjudication of the arbitration clause. I therefore disagree with the plaintiff on this point taken.

I need to address the relief sought by the defendant in the event that the special plea is upheld. The defendant has asked that in upholding the plea, the court should order that the plaintiff's claim be dismissed with costs on a legal practitioner scale and referred to arbitration in compliance with the policy. I am hesitant to go as far as pronouncing a dismissal on the action altogether because I have only turned my attention on the aspect of the proper forum. If I were to order a dismissal, it may place the entire issue into the realms of *res judicata* and my reluctance to do so is so as not to confuse the parties that my ruling is on the merits which is obviously not the position. It is to that end that I will avoid giving the parties the impression that I have entertained the merits. Thus my pronouncement will go as far as dealing with item (1) on the pre-trial conference issues which was:

"1. Whether or not the matter should be referred to arbitration"

From a reading of clause 14 itself, the arbitrator will be seized with a determination of the Issues 2 and 3 recorded on the joint pre-trial minute which pertain to the issue of the amount and which are recorded as follows:-

"2. Whether the plaintiff or the defendant breached the terms of the insurance policy?

and

"3. How much is the quantum payable by the defendant to the plaintiff, if any?"

I therefore order as follows:

1. The current proceedings are stayed and that in terms of Clause 14 of the arbitration clause in the policy document, the e matter is referred to arbitration for determination.
2. Costs are to be costs in the cause.

Manase and Manase, plaintiff's legal practitioners
Jambo legal practice, defendant's legal practitioners