ANDREW THOMPSON TRUST & INVESTMENT COMPANY (PRIVATE) LIMITED
and
MORDAVE INVESTMENT COMPANY (PRIVATE) LIMITED
and
GWANDEX (PRIVATE) LIMITED
and
CARSAN INVESTMENT COMPANY (PRIVATE) LIMITED
versus
ANTARES ZIMBABWE (PRIVATE) LIMITED
and
MESSRS JOEL PINCUS, KONSON AND WOLHUNTER

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 24 March & 18 May 2016

Opposed Application

D Tivadar, for the plaintiffs
T Mpofu, for 1st defendant

TAGU J: The plaintiffs and the first defendant entered into a share sale agreement as well as various related agreements. The first defendant breached its obligations under these agreements causing the plaintiffs damages. The plaintiffs cancelled the share sale agreement. On 22 June 2015 the plaintiffs issued summons against the defendants claiming (1) a declaration that the share sale agreement was duly cancelled; (2) an order cancelling the related shareholder and management agreement; (3) an order directing the second defendant to cause the transfer to each plaintiff of the shares they intended to sell; (4) an order against the first defendant to pay damages to the plaintiffs and (5) costs of suit. Accompanying the summons was a declaration consisting of 26 pages. Attached to the declaration were several annexures numbering over 82 pages. All in all the declaration and the annexures totalled 108 pages.

On 7 July 2015 the first defendant entered appearance to defend the above action. The second defendant who is sued in its capacity as escrow agent under the share sale agreement and related agreements has not entered an appearance to defend and has elected to abide the outcome of the matter.

On 17 July 2015 the counsels for the defendants wrote a letter of complaint to the plaintiffs' counsels in terms of r 140 of the High Court Rules, 1971 calling upon the plaintiffs

to withdraw their action proceedings and tender wasted costs on the basis that the declaration was defective. The letter in question read as follows-

> "2. Your declaration is defective in that it does not comply with the following Rules:
> (a) Order 15 Rule 99 (c) which requires a pleading to contain a statement, in a summary form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.
> (b) Order 17 Rule 109 which requires that a declaration should state truly and concisely the nature, extent and grounds of the cause of action;
> (c) Order 15 Rule 103 (2) which requires that whenever the contents of a document are material, it shall be sufficient in a pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material;
>
> 3. The unnecessary prolix, detail and evidence in the declaration is prejudicial to the 1st defendant. The 1st defendant is required to either admit or deny to every allegation in the declaration and if it undertakes this exercise on the current declaration it will be forced to plead and prove its case on the papers which is undesirable in action proceedings.
>
> 4. Furthermore, all relevant written agreements in dispute have an arbitration clause. In terms of the First Schedule Article 8 of the Arbitration Act [Chapter 7.15] where proceedings are brought before the High Court in a matter which is the subject of an arbitration agreement, the court shall, if a party so requests, 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.
>
> 5. We, therefore, intend to request the Honourable Court to refer the matter to arbitration….."

In response to the letter of complaint above the plaintiffs' counsels stated that they were instructed not to withdraw the action and urge the first defendant to proceed with the exception and Special Plea as it deemed fit.

The first defendant, through Mr *Mpofu* filed this application for exception and application to strike out. The first defendant except to the plaintiff's claim on the basis that it is vague and embarrassing in that it is not set out clearly and concisely as is required under law and cannot for that reason be properly responded to without causing first defendant prejudice in its preparation and execution of its defence. On the alternative, the first defendant made an application to strike out plaintiffs' declaration on the grounds that-

> "a. It does not constitute a pleading as contemplated by the rules of court and has been prepared in breach of the rules. See *Makaruse* v *Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) at 65 D-E; *Wilmont* v *Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at 419 C-D.
> b. It seeks to and does tell a story. See *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) at 236F-237A, *Mwanyisa* v *Jumbo & Ors* HH-3-10 at p 1 and *Morris* v *Morris & Anor* HH-7-2011 at p 2.
> c. It incorporates and contains evidence. See *Trust Merchant Bank Ltd* v *Lewis Murodzo Enterprises (Pvt) Ltd & Anor* 1998 (2) ZLR 387 (HC) and *Fuyana* v *Moyo* 2006 (2) ZLR 332 (S) at 339.

d. It is irrelevant, superfluous, verbose and unnecessarily argumentative. See Stephens v de Wet 1920 AD 279 at 282; *Golging* v *Torch Printing & Publishing Co.(Pty) Ltd & Ors* 1948 (3) SA 1067 (C) at 1090;
e. It is inherently prejudicial to the first defendant who cannot respond to the claim without breaching the rules of pleading and confusing the matter further." See *UDC Ltd* v *Shamva Flora* (Pvt) Ltd 2000 (2) ZLR 210 (HC).

Mr *Mpofu* submitted that the declaration for the above reasons must be struck out and the plaintiffs and must be ordered to prepare a fresh one.

The last point raised by Mr *Mpofu* was that attached to the summons and declaration is the agreement on whose basis the plaintiffs sue. He cited clause 11 of that agreement that says-

> "11.1 Any dispute arising out of or in connection with the Agreements, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Arbitration under the ICIA Rules, which rules are deemed to be incorporated by reference into this clause.
> 11.2 The number of arbitrators shall be one.
> 11.3 The seat, or legal place, of arbitration shall be at a place mutually agreeable to both the Purchaser and the Seller or otherwise to be London, United Kingdom.
> 11.4 The governing law of this agreement shall be the substantive law of Zimbabwe."

According to Mr *Mpofu* the first defendant has activated the arbitration clause hence this matter has been brought before the wrong forum and must be referred to arbitration. See *Church of the Province of Central Africa* v *Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418 and *Courtesy Connection (Pvt) Ltd & Anor* v *Mupamhadzi* 2006 (1) ZLR 479.

Mr *D Tivadar* opposed the application on behalf of the plaintiffs. He submitted in his heads of argument that there is nothing wrong with the declaration. His reasons being that the plaintiffs and the defendants entered into (1) a Share Sale and Purchase Agreement; (2) a Share and Management Agreement, (3) an Escrow Agreement, (4) a Deed of Representations and Warranties, (5) a Variation of the Terms of the Share Sale and Purchase Agreement involving two of the plaintiffs only and (6) a Loan Agreement. According to him all these agreements are complicated and inextricably intertwined, contributing to the length of the declaration. Hence these different contractual agreements, consequently, must be set out separately, and together with the material facts relied upon in respect of each claim. He attacked the first defendant for focusing on the number of pages that the declaration occupied yet the pleadings are as long as they are because they deal with all the issues and facts necessary for the plaintiffs to succeed. He therefore urged the court to dismiss the first defendant's application to except and strike out certain portions of the declaration.

As regards the special plea that the matter should be referred to arbitration, Mr *Tivadar* submitted that the first defendant's special plea is without any merit. This is because (1) there is no requisite "dispute" that could be referred to arbitration; (2) nor could there be such a dispute on the first defendant's own case; (3) the first defendant failed to consider the parties' contract as a whole and, consequently fell into an error of construction and the first defendant ended up seeking an order that is incompetent under the Arbitration Act. In the absence of a dispute he urged the court to dismiss the special plea. See *Cargill Zimbabwe* v *Culvenham Trading* [2006] ZWHHC 42, *Telecall (Pty) Ltd* v *Logan* 2000 (2) SA 782 and *PCL Consulting (Pty) Ltd* v *Tresso Trading* 119 (Pty) Ltd [2007] ZASCA 9.

Further, Mr *Tivadar* submitted that the first defendant made a fatal omission in its special plea in that the first defendant at no point did it refer to any other provisions of the Agreements. He said it is trite that contractual terms are not to be construed in isolation and the first defendant failed to realise that all the agreements contain the following provision-

> "This Agreement will be governed by, and construed in accordance with, the laws of Zimbabwe and the parties hereby irrevocably submit to the non- exclusive jurisdiction of the Zimbabwe Courts" (emphasis added)

He said the above express provision in the agreement is profoundly clear and unequivocal that either part may choose which court to go to as the provision did not say that arbitration is the procedure of first instance in resolving the parties' disputes. See *Shell Zimbabwe (Pvt) Ltd* v *Zimsa (Pvt) Ltd* 2007 (2) ZLR 366 (H) at 370 where Makarau JP (as she then was) said –

> "…for an arbitration clause in an agreement to have the effect of staying court proceedings in terms of the Act, such clause must be clear and unequivocal and the parties must intend arbitration to be the procedure of first instance in resolving their disputes,"

He further referred the court to a persuasive judgment in the case of *William Co* v *Chu Kong Agency* [1993] 2 HKC 377 where a relevant provision of the Hong Kong Legislation, ie, s 20 of the Arbitration Ordinance is the same as Art 8 of the Model Law as incorporated into the Zimbabwean Arbitration Act [*Chapter 7:15*] was dealt with in resolving a similar dispute resolution clause. In that case Kaplan J held:-

> "The clause is not void for uncertainty. It is a clause in a commercial document and this court must strive to give it meaning within the context of the commercial relationship of the parties."
>
> In my judgment, this clause should be construed in the following manner. The parties have agreed on arbitration or litigation in China. When a dispute arises, the claimant has a choice. He can either seek arbitration or litigation in China. Once he has made the choice, that is the end of the matter and the defendants will have no say. Once arbitration or litigation

> in China is chosen, that creates a binding choice to which the court will usually give effect."

According to Mr *Tivadar*, therefore, it was open to the parties to commence arbitration or litigation. Once the choice has been exercised, however, both parties are bound by it. He concluded argument by saying if clause 11 is held to be valid, then it contradicts clause 16 of the same agreement that creates a choice as to whether to litigate or arbitrate. To him the plaintiffs' claim cannot be dismissed due to clause 11 of the Share Sale and Purchase Agreement as (1) this would permit first defendant to avoid its contractual irrevocable submission to the Zimbabwean Courts, (2) the agreements do not clearly and unequivocally establish arbitration as the procedure of first instance and (3) once either party elects to litigate/arbitrate the other party is bound by this choice.

EXCEPTION/APPLICATION TO STRIKE OUT

While I do agree with Mr *Tivadar* that a number of the plaintiffs entered into a number of agreements with two defendants, and that these agreements are complicated and inextricably intertwined, contributing to the length of the declaration, I do not agree with his views that material facts and evidence attached to the declaration were necessary at this stage. It makes it impossible for the first defendant to plead to such a declaration without breaching the rules of pleading. In pleading to a declaration a defendant is expected to admit or deny each and every paragraph stated in a declaration. As properly stated by Mr *Mpofu*, r 99 of the High Court Rules, 1971 provides that a pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved. If one considers the attached documents to the declaration these are nothing other than the minute details of evidence which the plaintiffs are relying on. In my view this kind of declaration is not concise, and a party faced with such voluminous and irrelevant papers is obliged to object to it. The declaration *in casu* is not different to a situation faced by the court in the case of *Fuyana* v *Moyo supra*, cited by Mr *Mpofu* where the court did not tolerate such papers and held as follows-

> "Voluminous submissions, affidavits and documents relating to the validity or otherwise of an agreement of sale and the issue and status of the agreement of sale, were filed in this application for condonation. These were totally irrelevant to the issues I need to determine in this case……
> It is trite that supporting affidavits in an application should contain essential averments in support of the relief claimed. The papers filed in this case bear no resemblance to the above requirement. For example, the founding affidavit and its attachments run into some forty pages, yet there is no explanation as to why the notice of appeal was not filed in

> time. Further, as part of the application a bundle of documents of about seventy pages headed "evidence" was filed. Another bundle of documents entitled "Supporting Heads of Argument", consisting of not less than fifty-five pages was also filed. A good part of the so-called "Supplementary Heads of Argument" is devoted to principles of what the applicant called "Advocacy", "Advocacy A Code of Conduct", "Objections *in limine*". A long list of the cases that were cited and summarised in the supplementary heads of argument had no bearing on the application for condonation of the late noting of an appeal. There was also another bundle of documents filed in this application headed "Civil Appeal". This bundle of documents amounted to some forty pages and consisted of what the applicant called "Opening Speech", "Consolidated Heads "and "Closing Speech".In brief this application was overloaded with rubbish"

In casu the declaration is overloaded, not with "rubbish" as it where, but with unnecessary and objectionable documents that are to be produced during discovery later in the course of the proceedings. Their inclusion at this stage makes it extremely difficult for the first defendant to plead. In my view, the exception and application to strike out has been well taken. Accordingly this objection is granted.

SPECIAL PLEA

Regarding the special plea that this matter is before a wrong forum and that it must be referred to arbitration, the court noted that indeed the agreement contains two provisions that seem to be contradictory.

Clause 11 of the agreement says that "any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause."

Further, clause 16 of the same agreement deals with the law that governs this agreement. It says "this agreement will be governed by, and construed in accordance with, the laws of Zimbabwe and the parties hereby irrevocably submit to the non-exclusive jurisdiction of the Zimbabwe Courts".

In my view the agreement did not exclusively excluded the courts of Zimbabwe. I therefore agree with Mr *Tivadar* that the agreement gives any of the parties the option to go via the arbitration process or via litigation in the courts of Zimbabwe. What we have here is a situation where the plaintiffs opted to go via the courts in terms of clause 16 while on the other hand the first respondent is opting to go via arbitration.

Having considered the submission by the parties it is clear to me that arbitration was not chosen as the procedure of first instance in resolving the parties' disputes. If that was the intention of the parties then the agreement should have expressly said so. In the

circumstances I dismiss the first respondent's special plea and uphold the plaintiffs' prayer. As regards costs each party is to bear its own costs.

In the result, after reading documents filed of record and hearing counsels-

IT IS ORDERED THAT

1. The first defendant's exception/application to strike out be and is hereby upheld. The plaintiffs are ordered to redraft their declaration.
2. The first defendant's special plea be and is hereby dismissed.
3. Each party to bear its own costs.

Kevin J Arnott, plaintiffs' legal practitioners
Dube, Manikai & Hwacha, defendants' legal practitioners