PAPERHOLE INVESTMENTS (PRIVATE) LIMITED
versus
PIONEER HI-BRED ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6, 7, 8, 9, 22 & 23 February 2018, 26 March 2018
and 8 August 2018

Civil Trial – Absolution from the instance

G. Nyengedza, for the plaintiff
A. B. C. Chinake, for the first defendant

ZHOU J: This is an application for absolution from the instance at the close of the plaintiff's case. The plaintiff's claim against the defendant is for payment of a sum of US$201 335.63 in respect of inputs and funding given to the defendant for the growing of soya beans and maize during the 2012/2013 agricultural season. The plaintiff also claims interest on the amount stated above at the rate of 5% per month, together with costs of suit on the attorney-client scale. The claim is contested by the first defendant. The claim against the second defendant was withdrawn with the consent of all the parties.

The plaintiff's case, as pleaded, is that on 20 November 2012 it entered into a Finance Scheme Agreement with the first defendant in terms of which the plaintiff provided the defendant with financial assistance in order to facilitate the out-grower contracts which the defendant had with individual farmers of soya beans and maize during the 2012/2013 farming season. Among other things, the defendant was to pay the agreed contracted amounts and, further, cede to the plaintiff, as security, its rights under the out-grower contracts with the individual farmers who were involved in the scheme. The agreement, as alleged by the plaintiff, further provided that the first defendant was to pay the money due to the plaintiff on or before 31 July 2013 for the soya beans funding, and on or before 30 September of the same year for the maize funding. The plaintiff

alleges that the defendant failed to repay the money which was expended by the plaintiff in funding the farming activities in terms of the agreement. The first defendant's defence is that the agreement relied upon by the plaintiff was not authorized by the defendant and/or was fraudulent. There is also a further point taken that the plaintiff's claim has prescribed. When the joint pretrial conference minute was prepared it included the claim against the second defendant which has since been abandoned. The issue that remains between the plaintiff and first defendant in respect of which the evidence led must be considered is therefore whether a valid agreement was concluded between the parties. This is a matter that turns on whether Daniel Myers, the former second defendant, was authorized to represent the first defendant in concluding the agreement with the plaintiff.

The plaintiff led evidence from three witnesses and closed its case. These witnesses are Daniel Myers who had been joined as the second defendant, Andrew Mashonga and Talent Ndige. After the plaintiff had closed its case the first defendant applied to be absolved from the instance. Both parties have filed written submissions in support of their respective positions.

The *locus classicus* on the principles relative to an application for absolution from the instance is the case of *Gascoyne* v *Paul & Hunter* 1917 TPD 170, in which at p. 173 the Court said:

> "At the close of the plaintiff's case, therefore, the question which arises for the consideration of the court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the court would be, 'is there such evidence upon which the court ought to give judgment in favour of the plaintiff."

It has been held that an application for absolution from the instance at the close of the plaintiff's case is akin to and stands on much the same footing as an application for the discharge of an accused at the close of the case for the prosecution, see *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1(A) at 4C-D; *Walker* v *Industrial Equity Ltd* 1995 (1) ZLR 87(S) at 94F-G; *Taunton Enterprises (Pvt) Ltd & Anor* v *Marais* 1996 (2) ZLR 303(H) at 313C. In *Supreme Service Station (1969) (Pvt) Ltd, supra,* at 5D, BEADLE CJ expressed the test as follows:

> "The test, therefore, boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any

> greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all."

In the case of *United Air Carriers (Pvt) Ltd* v *Jarman* 1994 (2) ZLR 341(S) at 343B-C, the court said:

> "A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him."

See also *Walker* v *Industrial Equity Ltd, supra,* at 94C-D.

From the welter of authorities relevant to absolution from the instance, it is established that in case of doubt the court should always lean in favour of allowing the case to proceed to the defendant's case rather than granting absolution from the instance at this stage of the proceedings, see *Standard Chartered Finance Zimbabwe Ltd* v *Georgias & Anor* 1998 (2) ZLR 547(H) at 554A-B; *Bailey NO* v *Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484(H); *Supreme Service Station (1969) (Pvt) Ltd, supra,* at 6. A further principle which reflects the preponderance of judicial thinking on the preferred approach is that courts are "very loath to decide upon questions of fact without hearing all the evidence on both sides", per JUTA J in *Theron* v *Behr* 1918 CPD 443 at 451, which is cited in *Supreme Service Station (1969) (Pvt) Ltd, supra,* at 6; and *Standard Chartered Finance Zimbabwe Ltd, supra,* at 553B-C.

The first witness for the plaintiff, Daniel Myers, who is the second defendant was joined as such pursuant to an order of this court given during the pre-trial conference. However, at the commencement of the trial both the plaintiff and the first defendant indicated that they had no claim against the second defendant and the plaintiff accordingly withdrew the claim against him which had been made through the amended summons. Daniel Myers was the Managing Director of the defendant at the material time. He was also Regional Production Director for Africa at the same time. His evidence was that he rose to that position through the ranks from the position of Seed Inspector. The defendant is a subsidiary of an American registered company although it is registered in accordance with the laws of Zimbabwe. Following the imposition of economic sanctions by the Government of the United States of America, the defendant experienced economic challenges. Funding which had previously come from the majority shareholder, Dupont, ceased. He stated that the defendant entered into the contract upon which the instant claim is founded with the plaintiff. He and Kamambiri, the Finance Manager, represented the defendant and signed the

agreement on behalf of the defendant. Apart from this particular contract he signed many other contracts on behalf of the first defendant which have not been disputed by the first defendant. He stated that he had the authority to enter into the agreement on behalf of the first defendant. His evidence was that the first defendant did pay some money to the plaintiff pursuant to the agreement, leaving the balance which is the subject of this matter. According to him the plaintiff performed its obligations in terms of the contract and the amounts being claimed are due to the plaintiff.

The evidence of the other witnesses who testified on behalf of the plaintiff, Andrew Mashonga and Talent Ndige was essentially to show that the plaintiff and defendant did conclude the agreement on which the claim is based and that both parties did perform in terms of that agreement, save that the defendant still owes the amount that is being claimed.

In casu absolution from the instance is being sought on the single ground that there is an arbitration clause in the written agreement upon which the application is founded and that, therefore, this court has no jurisdiction to determine the dispute. An objection that the court has no jurisdiction whether on the basis of an arbitration clause or on any other ground must be raised by way of special plea. It cannot be raised through the written submissions filed in support of an application for absolution from the instance. The reason for that is that this is a court in which issues for trial are presented through pleadings. Written submissions such as those in which the matter is raised are not a pleading. The issue of whether this court has jurisdiction is not one of those referred to trial, hence there was no need for evidence to be led on it and, consequently, it is not one on the basis of which it can be said that on the evidence led the court might not make a reasonable mistake and find for the plaintiff. The application for absolution from the instance is therefore misconceived on that account alone.

The need to raise an objection based on an arbitration clause by way of special plea is further justified by the fact that an arbitration clause does not have the effect of ousting the jurisdiction of the court, but merely to delay its interposition, see *Dipenta Africa Construction (Pty) Ltd* v *Cape Provincial Administration* 1973 (1) SA 666(C); *Rhodesia Railways Limited* v *Mackintosh* 1932 AD 359. In the case of *University of Stelenbosch* v *J A Louw (Edms) Bpk* 1983 (4) SA 321(A) at 333G, the Appellate Division held: "It has always been recognized that an

arbitration agreement does not necessarily oust the jurisdiction of the courts." In *Parekh* v *Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 305E-H, DIDCOTT J said:

> "An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. . . ."

Put in other words, an arbitration agreement is not an automatic bar to legal proceedings in respect of disputes which fall within the purview of the agreement. Because of that, it would be undesirable for a party to seek stay of proceedings which have commenced, in which the plaintiff has led all its evidence and closed its case, on the basis that the dispute should have been dealt with by way of arbitration. The submission that this court has no jurisdiction, which is the only basis upon which the application for absolution from the instance is predicated, is therefore not sustainable. The application is founded upon a legally unsound ground.

In any event, I doubt that the clause which the defendant seeks to rely upon in the application for absolution from the instance is an arbitration clause, given that it does not make arbitration compulsory as such. Rather, the clause requires the parties to hold a meeting first. Even where that meeting fails to resolve the dispute the plaintiff is still given the "absolute right to approach a competent court for relief" should it so decide, or to refer the matter for determination by an expert. Clearly, this is not a clause in which there is a requirement to refer the dispute to arbitration before the plaintiff can seek recourse through the court.

The plaintiff has asked for costs to be awarded on the attorney-client scale. That is a special order of costs which is reserved for special situations such as where the litigant against whom it is sought is guilty of some reprehensible conduct. In the instant case the application for absolution from the instance is vexatious. The special order of costs is therefore justified by the vexatiousness of the application.

In all the circumstances, the application without merit.

In the result, the application for absolution from the instance is dismissed with costs on the attorney-client scale.

Scanlen & Holderness, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners