

CHIVERO STANLEY MDOKWANI
versus
EFFORT JERA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 16 March and 7 June 2023

Plea in Bar

Mr *W Chagwiza*, for the applicant
Advocate Chinwawadzimba, for the respondent

MHURI J: On 4 November 2022 plaintiff issued summons claiming an order declaring the cession agreement entered into between the parties on the 12th December 2019 in respect of a portion of subdivision 3 of Devon Estates in the District of Marondera measuring 10 hectares to be null and void on the grounds that the cession agreement was entered into in violation of the plaintiff's tenure which specifically prohibited the plaintiff from ceding rights to the farm or a portion thereof without the consent of the Minister of Lands and Rural Resettlement. Consequently, an order directing the defendant and all those claiming occupation through him to vacate from the said subdivision within 48 hours of being served with this court's order, and an order for costs.

On 17 November 2022 defendant entered appearance to defend and also requested further particulars so as to enable him to plead.

On 24 November 2022 plaintiff furnished defendant with the requested further particulars.

On 19 December 2022 defendant filed a Plea in Bar to plaintiff's claim, to the effect that plaintiff's claim ought to be resolved by way of arbitration or alternatively that there is a fatal non-joinder of the Minister of Lands, Agriculture, Fisheries, Water and Rural Development.

The basis of the plea in bar was firstly that clause 14.1 of the parties cession agreement specifically provided that all disputes arising out of or relating to the disputes as to the meaning or interpretation of any provision of the agreement or as to the carrying into effect of any such

provision of the agreement or as to the quantification or determination of any particular amounts or thing required to be determined or quantified in terms of or pursuant to this agreement to be referred to arbitration.

Secondly, it was that the land in question belongs to the State as represented by the Minister of Lands, Agriculture, Fisheries, Water and Rural Development who has not objected to the cession agreement on refused to give his consent to it. Being the owner of the land and whose non-consent is being used as a basis to vitiate the agreement, the Minister is a necessary and interested party to these proceedings and the failure to cite him is fatal.

Defendant's prayer was that the special plea in bar be allowed with costs and that plaintiff's action be stayed until the dispute between the parties has been resolved by way of arbitration.

In his reply to the plea in bar, plaintiff refuted that the dispute ought to be resolved by way of arbitration as the cession agreement is invalid and therefore the arbitration agreement is unenforceable and is of consequence. He also refuted that there is fatal non-joinder of the Minister of Lands as the Minister is not party to the cession agreement and also that the Rules of this Court provide that no matter shall be defeated by reason of non-joinder of any party.

At the commencement of this hearing, plaintiff's legal practitioner raised the point *in limine* to the effect that a reading of Article 8 of the Arbitration Act shows that a special plea wherein proceedings are to be stayed and a request for referral of matter to arbitration should be made by a defendant who has not taken any steps in terms of filing of papers which address the dispute. He submitted that *in casu*, defendant filed a request for further particulars and that request is a step taken in the determination of issues by the Court, it is a pleading which delves on the substance of the dispute as such defendant cannot at this stage turn around and say the matter should be referred to arbitration. On that basis, plaintiff prayed that the special plea be dismissed and defendant be ordered to file his pleadings.

Despite having indicated that the point has been raised without notice, defendant's counsel responded that there is no first statement on the substance of the dispute. The first statement will be a plea and none was filed by defendant. The request for further particulars was for defendant to understand plaintiff's cause before he could respond as it was wrong to allege that the request for further particulars was a first statement to the substance. He moved for the point to be dismissed.

It is not in issue that in their memorandum of agreement, plaintiff and defendant agreed that all disputes arising out of or relating to their agreement will be referred to arbitration. This is provided in paragraph 14.1 of their agreement.

Article 7 of the Arbitration Act [*Chapter 7:15*] defines an arbitration agreement, particularly sub clause (1) provides:

“(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.”

Clause 14.1 of the parties’ memorandum of agreement falls under the ambit of the above Article.

Article 8(1) which plaintiff is relying on reads as follows:

“A court before which proceedings are brought in a matter which is the 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.

(2)

The above article is clear and unambiguous. A party can only make the request before he/she submits his/her first statement on the substance of the dispute. *In casu*, defendant requested further particulars from the plaintiff all in relation to the substance of the dispute in question. Plaintiff duly supplied the particulars requested. I agree with plaintiff’s submission that a request for particulars is a step taken in the determination of issues by the Court. It is a pleading which delves on the substance of the dispute as the request solicits answers on the substance of the dispute.

In my considered view therefore, defendant having submitted his first statement by requesting further particulars, he cannot now turn around and apply to stay proceedings and have the matter referred to arbitration. Defendant was a step too late.

When considering a similarly worded provision as in the Arbitration Act, the court in the case of *Rhodesia Railways Ltd vs Mactintosh* 1932 AD 359 WESSELS ACJ at pp 370-371 stated:

“...if you have taken any step in the proceedings, then you can no longer adopt the speedier and less costly procedure of applying to the court to stay proceedings but you must file your proceedings in the ordinary way. In pleading, however, you can raise the defence that the case ought to be decided by arbitration....”

In that regard therefor, I find that the point *in limine* raised by plaintiff was well taken and I uphold it.

Consequently, the special plea in bar raised by defendant ought to be dismissed and is hereby so dismissed with costs.

Kwenda & Chagwiza, plaintiff's legal practitioners
Jera & Partners, defendant's legal practitioners