

ANYWAY CHOTO  
versus  
GRAY HOMES (PVT) LTD

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
MANZUNZU J  
HARARE, 27 June 2024 & 10 March 2025

## **CIVIL TRIAL**

*R Mabwe*, for the plaintiff  
*T L Mapuranga*, for the defendant

## **MANZUNZU J**

### **INTRODUCTION**

The plaintiff sued the defendant for breach of contract. In its plea the defendant has raised an objection that the matter ought to be referred for arbitration as per agreement of the parties. That objection has been resisted by the plaintiff who also fights back that the objection was not raised procedurally.

### **BACKGROUND**

- (1) On the 21st March 2024, the plaintiff issued summons for payment of US\$122 163.00 being a refund of the construction price or project price paid to defendant by the plaintiff in terms of a construction agreement; payment of US\$ 135 000.00 being damages for breach of contract; payment of US\$ 317 419.12 being loss of profit and costs of suit on a legal practitioner and client scale.
- (2) On 10th April 2024 the Defendant filed its plea on the substantive issues and took a preliminary objection that the claim must be dismissed because it was in the wrong forum as it ought to start with arbitration.
- (3) At the close of pleadings, the parties met and at a case management conference agreed on the following issues;
  - a) Whether or not the matter ought to be referred to arbitration.
  - b) Whether or not defendant breached the contract.

c) If so, whether or not the plaintiff is entitled to damages from breach of contract and in that case, how much.

(4) The court directed the parties to file heads on the first issue which was set down for argument on 27 June 2024.

## ISSUES

Two issues arise for determination in respect to the objection. These are;

- i) Whether the objection was procedurally taken.
- ii) Whether the case should be referred to arbitration.

*Whether the objection was procedurally taken.*

Ms *Mabwe* for the plaintiff argued that the preliminary point was filed outside the provisions of the Rules, in a trial matter that is ripe for hearing and it raises no issues of law and must be treated as invalid. She urged the court to dismiss it and proceed to trial.

In support of the above assertions she cited rule 12 of the High Court (Commercial Division) Rules, 2020 which provides for the filing of an exception, Special Plea or Plea together with the bundle of evidence. Where no Special Plea or exception has been filed, after the conduct of the case management meeting, the matter must be referred for trial in terms of R17 (1) (d), it was further reasoned.

It was further argued for the plaintiff that a special plea cannot be pleaded within a plea for the merits. see *Sammys Group (Pvt) Ltd v Meyburgh (NO) & Ors S-45-15*. In the absence of filing a special plea, it was further argued, the matter must be referred to trial and the dispute will be dealt with during trial. The plaintiff relied on *Allied Bank Ltd v Dengu & Anor S-52-16*, where the court had this to say,

“The fact that the issue of *locus standi* was a point of law which could be taken at any stage in the proceedings could not assist the respondents. Although it is trite that a point of law can be raised at any stage during proceedings, that does not mean that the point of law can be raised anyhow. In order for one to raise a point of law validly at any stage, notice must be given to the other party of the intention to raise the point. There must be a formal way of raising the point. In this case, the issue was raised in correspondence between the parties. The issue of *locus standi* was not properly pleaded by the respondent. The court *a quo* erred in accepting the plea of lack of *locus standi* which was not properly raised.” (*my emphasis*).

Mr *Mapuranga* on the contrary argued that it is an established principle of law that a preliminary point challenging the jurisdiction of this Honourable Court to determine the dispute between the parties goes to the root of the proceedings. It raises a critical point of law, which can be raised at any point see *Muchakati v. Netherburn Mine* 1996 (I) ZLR 153 (S) where the Supreme Court confirmed this position to the effect that a point of law that goes to the root of the matter can be raised at any time. He further argued that there is no rule of thumb to how points of law can be raised. He further said there was nothing irregular to raise an objection on a point of law simultaneously with a plea on the merits. He cited *Cargill Zimbabwe v Culveham Trading (Pvt) Ltd* HH 42/06 where the court remarked,

“In case, no plea was filed to meet the claim. In the absence of a plea, no dispute arises between the parties. Secondly, it is my view that the filing of a plea on the merits of the matter does not bar a defendant from simultaneously or thereafter raising the special plea seeking referral of the matter to arbitration.”

He urged the court not to take a slavish approach regarding form but to entertain points of law that go to the root of the matter, regardless of the form in which they come. He further emphasized that the issue of jurisdiction is fundamental throughout the cycle of the proceedings. The authority of *Dube v. Matseka* SC 48-23 was cited which stated,

“It is trite that the issue of jurisdiction remains alive between the parties at every stage of the proceedings. It may therefore be raised at any stage of the matter...In any proceedings it is convenient that the issue of jurisdiction be raised right at the commencement of proceedings to avoid wasting time and money. It is pointless to proceed with a trial in which the court has no jurisdiction.”

Article 8(1) of the UNCITRAL Model Law set out in the Arbitration Act [Chapter 7:15], was said to be pertinent to the objection. It provides that; “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.”

Ms *Mabwe* urged the court to go into a trial because the defendant pleaded the merits. I do not think that is the right approach because the issue of jurisdiction is key and if it succeeds its dispositive of the matter. I do not think it is unprocedural for the court to direct that the issue of jurisdiction be dealt with first because its determination either opens or closes the door to the case.

An objection to the jurisdiction of the court must be raised through a special plea. A special plea is governed by rule 12 of the High Court (Commercial Division) Rule 2021. This rule lays down the procedure thus;

“(1) The defendant shall file a plea, exception, special plea or other answer within seven days of service of the plaintiff’s summons and declaration issued and served under these rules.  
(2) The plea, exception, special plea or other answer shall be supported by a paginated and indexed bundle of all relevant and material documentary evidence and a summary of the evidence that the defendant relies on which shall be in Form No. CC 2.’’ (*my emphasis*).

I agree with Ms *Mabwe* that while the objection to the jurisdiction is not a nullity, it is actually invalid because it does not comply with the rules. Its cure rests with an application for condonation to rectify it through a special plea. That was not done, so it remains invalid. A litigant who realizes that he has not complied with the requirements of a rule must, as soon as he becomes aware of the noncompliance, apply for condonation of the noncompliance with the rules, see Commissioner for *Inland Revenue v Burger* 1956 (4) SA.

The objection is improperly before the court. In the premise there is no need to deal with the second issue.

#### DISPOSITION.

1. The objection to the jurisdiction of the court be and is hereby struck out with costs.
2. The case shall proceed to trial in respect of the remaining issues.

*Musemburi Legal Practice*, plaintiff’s Legal Practitioners.

*Saunyama Dondo*, defendant’s Legal Practitioners.