ZIMBABWE TOBACCO GROWING COMPANY
(PVT) LTD t/a NORTHERN TOBACCO
versus
GEORGE MANIWA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 19 March 2015

Special Plea

B Peresuh, for the plaintiff
R Chingwena, for the defendant

CHITAKUNYE J: On 4 February 2011 the plaintiff sued defendant for the payment of a sum of $ 41466-59 being a sum owing by the defendant to plaintiff in terms of a written acknowledgment of debt dated 26 June 2010.

The defendant in his plea admitted the main claim and raised a counter claim. The plaintiff raised exception to the counter claim alleging that the counterclaim was incomprehensible and it left the plaintiff unable to determine just what the defendant was suing on or why. The defendant conceded to that allegation and filed an amended counter claim by consent of the plaintiff. From that amended counter claim it is clear that the defendant's counter claim is in contract and is founded upon a written agreement.

The plaintiff persisted with the exception alleging that in terms of clause 6.5 of the written agreement between the parties the dispute defendant raised is supposed to be referred to arbitration. The defendant has thus brought the counter claim in the wrong forum. The counter claim must therefore be stayed and the main claim ought to proceed notwithstanding the mandatory stay of the counter claim.

Both Counsel for the parties were agreed that indeed defendant's counter claim was founded on the written agreement. That agreement provides in clause 6.5, *inter alia*, that:-

> "In the event that an irreconcilable difference of opinion arises over the interpretation or implementation of this Agreement, the Parties shall submit themselves to the determination of

> a mutually agreed Arbitrator and shall bind themselves to accept the decision of such Arbitrator..."

Plaintiff's counsel argued that plaintiff has already denied being indebted to the defendant on any basis arising from the implementation of that contract and so his counter claim is a dispute which he must refer to arbitration.

Counsel for the defendant, on the other hand, contended that on the present record there is nothing establishing the existence of a dispute.

The first issue is thus when is a dispute said to have been shown to exist?

In *Cargill Zimbabwe* v *Culvenham Trading (Pvt) Ltd* 2006 (1) ZLR 381(H) at 382 F-G MAKARAU J (as she then was) had this to say on the point:-

> "For a court to stay its proceedings and refer the matter to arbitration there must be a dispute between the parties apparent *ex facie* the pleadings. This appears to me to be a settled position of our law. (*See PTA Bank v Elanne (Pvt) Ltd & Others* 2000(1) ZLR156 (H) and *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999(2) ZLR448 (H)

At page 383D-F the learned judge alluded to the manner a dispute must be raised and concluded thus:-

> "In my view, a dispute between the parties can only arise *ex facie* the pleadings filed with the court. It cannot be assumed or presumed from the mere fact of the entry of an appearance to defend. It is my further view that the dispute cannot be brought to the attention of the court in the heads of argument for counsel cannot plead on behalf of the parties. It is trite that heads of argument are counsel's conclusions and opinion of the facts and law applicable to the facts of the matter. They are not part of the pleadings.
>
> From the above, it appears to me that before raising a special plea staying proceedings in this court and referring the matter to arbitration, the defendant must file a plea as to the merits of the matter for the dispute between the parties to arise ex facie the pleadings. It further appears to me that any practice short of this will result in the special plea being dismissed as having been prematurely filed."

I concur with the above expose of the law. There is need for defendant in the counter claim to plead on the merits and show that there is a dispute.

The record before me shows that after defendant raised the counter claim plaintiff requested for further particulars on the counter claim and these were furnished on 19 August 2011. It is apparent that pleadings were later closed and the parties filed pre-trial conference document s including effecting discovery. The issues suggested by the parties included the issue in dispute. On 27 June 2012 the parties through their respective legal practitioners signed a joint pre-trial conference minute. The issues referred to trial therein pertained exclusively to the contract in question. It is clear from the joint pre-trial minute that parties

were clear that there was a dispute between them regarding the interpretation and implementation of the agreement in question.

The matter was thereafter referred to trial. I did not hear either counsel to suggest any other reasons for the preparation of the joint pre-trial minute and reference of the matter to trial other than that the parties had examined their respective pleadings and noted a clear dispute that needed to be resolved in a trial. Such dispute could not have arisen if plaintiff had noted tendered a defence to the counter claim. I am thus of the view that a dispute was shown to exist hence issues referred to trial.

In the circumstances, as per clause 6.5 of their written agreement, the parties agreed that such a dispute must be referred to arbitration and that should be so. As both Counsel acknowledged art 8 (1) of the Model Law (arbitration Act) chapter 7:15, first schedule enjoins court to refer the matter to arbitration. See *Waste Management Services* v *City of Harare* 2000(1) ZLR 172(H) at 178A-C.

Since plaintiff has requested that the counter claim be referred to arbitration in terms of clause 6.5 of the parties' agreement, this court will refer the matter to arbitration.

It must however be made clear that reference to arbitration does not ouster court's inherent jurisdiction. As stated by MAKARAU J in *Cargill Zimbabwe* v *Culvenham Trading (Pvt) Ltd.* (*supra*) at 383G -384:-

> "It is only the proceedings that are stayed pending referral of the dispute to arbitration. An arbitration clause does not have the effect of ousting the jurisdiction of the court. It merely seeks to complement the court process in resolving disputes by engaging in an alternative dispute resolving process but remains under the control of the courts."

In view of the fact that the matter will remain before the court even though referred to arbitration, defendant's counsel argued that court must consider the effect of a counter claim and not refer the matter for arbitration. Reference to arbitration will be clogging the courts with a matter that could have been decided at the same time as the main matter. I am however not persuaded by his argument. In my view the parties were very clear as to which forum they desired their dispute to be referred to. That clause states that:

> "In the event that an irreconcilable difference of opinion arises over the interpretation or implementation of this Agreement, the Parties **shall** submit themselves to the determination of a mutually agreed Arbitrator and shall bind themselves to accept the decision of such arbitrator..." (emphasis is mine)

In as far as it is agreed that the main claim is based on an acknowledgement of debt such indebtedness is clear. Defendant admitted same. Judgment will thus be granted in that sum.

It is also common cause that the main claim and the counter claim are intertwined such that, but for the arbitration clause, it would have been most appropriate to deal with the two at the same time. It is my view that the execution of the judgement in the main matter will be stayed pending the outcome of the arbitration.

Accordingly it is ordered that:-

1. Judgment be and is hereby entered for the plaintiff in the sum of US$ 41 466-59 in respect of the main claim with interest and costs of suit.

2. The execution of this judgement be and is hereby stayed pending the determination of the arbitration in terms of clause 6.5 of the written agreement between the parties.

Honey & Blanckenberg, plaintiff's legal practitioners.
Chingore & Associates, respondent's legal practitioners