BUYWEST INVESTMENT (Private) Ltd
versus
HUNYANI FORESTS LIMITED

HIGH COURT OF ZIMBABWE
MHURI J
HARARE 26 January and 23 February, 2022

Opposed Matter

Mr. P Phatisani, for plaintiff.
Mr G Ndlovu, for defendant.

MHURI J: On 03 September 2021 plaintiff issued summons against defendant for a cause of action that arose from an agreement of sale entered into by the parties on 21 September 2018 for the sale of machinery and equipment.

The plaintiff's claim against defendant is for an order declaring;

1) that clause 4 of the agreement of sale of machinery and equipment entered into on 28 (sic) September 2018 by the parties is invalid and is struck off from the agreement as it allows defendant to summarily repossess the equipment without compensating plaintiff.
2) that from 28 (sic) September 2018 and as on the date of removal by the Sheriff on 22 October 2020, plaintiff was the rightful and lawful owner of certain equipment and machinery namely a refurbished creosote treatment cylinder 14 metres long and pumps; CCA plant and tanks; pale trailers and sawmill and pole trolleys.
3) costs of suit on a legal Practitioner – client scale.

Plaintiff's declaration in support of his claim is as follows, that:-

1) as per the agreement, plaintiff would pay defendant US$ 60000-plus 15% VAT as the purchase price.

2) plaintiff would dismantle and remove the equipment from defendant's premises upon confirmation of receipt of the purchase price.

3) in terms of clause 4 of the agreement, plaintiff would remove the equipment from, defendant's premises within 90 days from date of receipt of the full purchase price. Upon failure to collect the equipment within 90 days, defendant reserved the right to take repossession of the equipment without compensation to plaintiff.

4) in the event of either party being in breach, the innocent party was required to give the breaching party written notice to rectify the breach in 14 days.

5) in terms of the agreement, plaintiff paid the full purchase price.

6) plaintiff took delivery of equipment longa *manu* with the intention of taking ownership of the equipment.

7) defendant waived the 90 day collection period and condoned plaintiff's failure to collect the equipment within 90 days.

8) plaintiff collected some of the equipment but left some.

9) upon collection of the remaining equipment plaintiff was barred from collecting it by defendant.

10) defendant's reliance on clause 4 was wrongful as clause 4 is void in terms of the law, more particularly common law, in so far as it allows defendant to repossess the equipment summarily without compensation to plaintiff and without recourse to the law.

11) Defendant did not put plaintiff in *mora* or otherwise invoke breach of the agreement.

On 16 September 2021, defendant entered appearance to defend and filed a special plea on 05 October 2021 raising two issues to wit:-

-Lack of jurisdiction and

-Lis pendens

Ad lack of jurisdiction

It was defendant's case that:

a) clause 10 of the agreement provides that any dispute between the parties in respect of cancellation, interpretation or implementation of the agreement is to be resolved through arbitration by an arbitrator appointed by the Commercial Arbitration Centre. A dispute has arisen as to:

i. Whether or not defendant was at law entitled to exercise its rights in terms of clause 4 of the agreement between the parties to repossess the equipment without compensation upon the plaintiff failing to collect the equipment within 90 days
ii. The ownership of the equipment
iii. The legality of clause 4 of the agreement of sale

a) this court therefore has no jurisdiction over this matter, or should hold over these proceedings to allow arbitration proceedings to unfold to finality without duplication of the dispute resolution process

b) Honourable JUSTICE MTSHIYA (Rtd) has already been appointed as the arbitrator to resolve the dispute above and proceedings have commenced.

c) parties have already filed their papers in such arbitration and are awaiting a hearing date

(today 26 January 2022, defendant's counsel advised that the arbitration hearing has been set for 1 March 2022.

Ad lis pendens

Defendant's case is that:

1. The same parties are already engaged in arbitration proceeding before JUSTICE MTSHIYA over the same equipment.
2. The issues before the arbitrator are similar to the issues before this court in the action matter particularly
    a) The ownership of the equipment
    b) The legality of clause 4 of the agreement of sale
    c) Whether or not the claimant properly exercised its rights under clause 4 of the agreement.

It was defendant's prayer that, to the extent that the same subject matter and the same issues are currently before a competent Tribunal, the plaintiff's claim be dismissed with costs or alternatively that these proceedings be stayed with costs on a higher scale pending the determination of the arbitration proceedings before Justice MTSHIYA (Rtd)

It is common cause that the parties entered an agreement for the sale of assets. Clause 4 of the said agreement which is an issue between the parties reads as follows:

> "Dismantling and removal of Assets:
> The Purchaser shall not commence dismantling and removing the Assets until such time as the seller has confirmed receipt of the purchase price. The cost of dismantling and removing the assets shall be borne in full by the purchaser. It is specifically recorded that the assets shall be removed from the premises within 90 days from the sellers' receipt of full purchase price. The seller undertakes that the purchaser shall have access to the premises in so far as is necessary in the immediate vicinity of the Treatment Plant area for the removal and loading of the assets. Should the assets, or any part thereof fail to be removed from the premises within the 90 days period , and should no extension of time, be previously agreed by the parties in writing, then the seller reserves the right to take re-possession of the assets without compensation to the purchaser"

Clause 10 of the said agreement reads:

> "Arbitration
>
> In the event that any dispute shall arise between the parties as to the coming into effect of this agreement or its interpretation, or arising out of the implementation of this agreement or its cancellation, then such dispute shall be referred to arbitration by an arbitrator appointed for that purposes by the parties or failing their agreements in that connection with *(sic)* fourteen (14) days of a dispute having been declared, appointed by the commercial Arbitration centre in Harare on the written application of either party which application shall be copied to the other party"

(underlining my own)

The two clauses above are clear and unambiguous in their meaning. They need no interpretation at all. Particularly clause 10 is quite clear as to what is to happen when a dispute arises between the parties, namely, as to the coming into effect of the agreement or its interpretation or arising out of the implementation of the agreement or its cancellation. The dispute is referred to arbitration. This agreement is duly signed by the parties. They are bound by its terms and conditions no matter how onerous they can be.

In casu, a dispute arose about the implementation of the agreement, particularly the ownership of the assets, the re-possession of the assets, *mora* and the interpretation of clause 4 of the agreement. These issues fall squarely under the ambit of the agreement and therefore can be resolved at arbitration as clause 10 provides.

It is common cause that by July 2021 the, matter had been referred to arbitration and Justice MTSHIYA was appointed arbitrator and the 21 July 2021 was the pre arbitration hearing date if the parties were available. Summons in the main action by plaintiff were only issued on 03 September 2021 that is months after the arbitration process had been set in motion. Reliance therefore, on Article 8 (1) of the Arbitration Act (Chapter 7:15) is misplaced. Defendant is not saying the matter should be referred to arbitration. The matter as at the date of issuance of the summons was already pending at arbitration.

Article 8 (1) reads:-

> "A court before which proceedings are brought in a matter which in 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 these proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Further, it is not plaintiff's issue that clause 10 (the arbitration agreement) is void, or invalid. Its issue is a clause 4 of the agreement the interpretation of which can be done by the arbitrator in view of clause 10.

The issues before the arbitrator are the same as the issues raised before this court by the plaintiff to wit legality of clause 4 of the agreement, ownership of the assets and the issue of *mora* which is consequential to clause 4. The dispute in between the same parties and before a competent Tribunal.

The plea of lis pendens was aptly stated by HUNGWE J (as he was then) in the case of *TAMIRA OVERSEAS SA vs OLIVER MASOMERA AND ORS HH 312/21* as follows:

"a plea of lis pendens is based on a proposition that the dispute between the parties is being litigated elsewhere and therefore it is in appropriate for it to be litigated in the court in which the plea is raised.

In order for a matter to qualify as lis pendens it is trite that the two actions must be between the same parties or their successors in title, concerning the same subject matter and founded on the same cause of complaint"

The defendant's case meets the requirements of this position of the law. Plaintiff had also submitted that the arbitrator is the one who, in terms of clause 4 (2) (a) of the Arbitration Act lacked the jurisdiction to hear the matter. This clause reads:-

> "the following matters shall not be capable of determination by arbitration.
> (a) an agreement that is contrary to public policy;"

I am not persuaded by this submission. Plaintiff's issue is not about the validity of the entire agreement, but it is about the validity of clause 4 only. Plaintiff conceded in his submissions that Article 8(1) of the Arbitration Act refers only to the arbitration agreement and not the substantive agreement.

As submitted by defendant, that challenge on jurisdiction on the ground of public policy can only be sustained after a finding has been made to that effect. The issue of jurisdiction can be raised as a preliminary point before the arbitrator who is then obliged to make a finding on the point.

It is trite that in terms of section 14 of the High Court Act (Chapter 7:06) the High Court has jurisdiction to hear applications such as plaintiff's application.

In *casu* however the dispute between the parties is lis pendens before a competent Tribunal, for arbitration as provided in terms of the parties' agreement. These proceedings should be left to continue to finality and the current application be struck off.

I will in the result uphold the special plea raised by defendant. Plaintiff instituted its proceedings before this court when it was well aware of the pending proceedings before the arbitrator, which it ought not to have done. I will therefore grant costs on a higher scale.

It is therefore ordered that the special plea be and is hereby upheld and applicant's application be and is hereby struck off with costs on the legal practitioner and client scale.

Antonio and Dzvetero , Planintiff's Legal Practitioners
Gill, Godlonton and Gerrans, Defendant's Legal Practitioners