HELENSVILLE CONSTUCTION (PVT) LTD
versus
KADOMA CITY COUNCIL

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 17 May 2018 & 25 July 2018

Opposed Application – Special Plea

T Nyamucherera, for the plaintiff
Adv. Zhuwarara, for the defendant

CHAREWA J: The plaintiff issued summons against the defendant, claiming payment of $34 378.06 for services rendered and $50 441.49 being damages for breach of contract. The defendant raised a special plea that, since the plaintiff's claim is based on a contract which provides for a dispute resolution mechanism for all contractual matters, the action should be stayed pending referral of the dispute in terms of Annexure 3, Clauses 4.1, 24 and 25 thereof.

The facts

The parties entered into a contract wherein plaintiff was required to rehabilitate Cameroun Square in terms of specifications laid down in the contract. The contract value is $102 584. The contract duration is two months from date of commencement. Clause 14 provides for relief in case of "default" by either party.

Clause 4.1 of Annexure 3 to the contract clothes the project manager with power to decide on contractual matters between the parties except where specifically stated. This Annex 3 also provides that the project manager is responsible for supervising the execution of works and administration of the contract, with the role to approve the program of works, modifications thereto, clarification of conditions of contract, and any variations or increase in costs as well as to receive any weekly or necessary reports on all aspects of the project.

Clause 24.1 allows for any decision of the project manager which is disputed on the grounds that it is outside his authority or is wrongly taken to be referred to an adjudicator.

Clause 25 prescribes the adjudication procedures, which include the option for referral to arbitration in the event that the adjudicator's decision is contested.

On 21 June 2017, the defendant gave notice to the plaintiff of termination of the contract in terms of clause 17 on the basis of plaintiff's breach. The nature of the breach is not before the court, but is apparently contained in a letter sent to the plaintiffs on 13 June 2017. Nor is it apparent on the record that plaintiff took issue with the allegations of breach when they were raised. Nonetheless, defendant undertook to pay plaintiff for works done up to the date of termination, less what was due to defendant. As a consequence plaintiff presented an invoice of $34 378.06, which invoice remains unpaid.

In limine

The defendant raised the preliminary point that the plaintiff having failed to file its replication to the special plea, then it must be held to have accepted the special plea. I do not intend to waste time on this point which I summarily dismiss.

While it is true that it is incumbent upon a plaintiff to file a replication to inform the court of the grounds upon which a special plea is challenged,[1] the fact remains that it is within the discretion of the court to order a plaintiff to file a replication if the court deems it necessary for the proper adjudication of the issues raised. This is particularly so in circumstances such as in our jurisdiction where the rules do not provide for the filing of a replication.

The heads of argument filed in this case sufficiently traverse the grounds of opposition to the special plea. I am not therefore, inclined to exercise my discretion and order that a replication be filed as it is clear that this is a matter which can be resolved without such replication.

Parties' submissions

The plaintiff submits that its claim is based purely on the contract between the parties: that it was expected to provide a service, which it did, and is thus entitled to payment of $34 378.06 premised on defendant's undertaking to pay any monies due for services rendered as per its letter dated 21 June 2017. In addition, because services were terminated contrary to the terms of the contract, plaintiff submits that defendant therefore breached the contract and ought to pay damages in the amount of $50 441.49 predicated on the balance of the contract value due to the plaintiff had there been no breach. Plaintiff thus argued that the issue of resort to the dispute resolution mechanism does not, therefore, arise as the project manager took no decision

[1] See *Van Brooker v Mudhanda* SC 5/2018

to trigger it. In any event, the special plea is precipitate as, before a plea on the merits is filed traversing any points of contention in the decisions of the project manager, there is no dispute requiring the matter to be referred to adjudication in terms of the contract between the parties. Further, and in any case, plaintiff avers that the jurisdiction of the court is not ousted as there is no proper arbitration clause in the contract. And even if clause 24 and 25 of Annexure 3 to the contract were construed to be arbitration clauses, they do not apply to instances of breach of contract or any ensuing claim for damages. Therefore the special plea is not properly before the court.

On its part, the defendant submits the contrary view: that clauses 24 and 25 reveal that the parties had a dispute resolution mechanism, worded in imperative terms, and which plaintiff ought to exhaust first as the remedies therein automatically oust the jurisdiction of the court. Further, defendant avers in its heads of argument that the dispute between the parties emanates from a final payment certificate for $4 376.41 issued by the project manager and which it disputes, thus putting the matter squarely within the ambit of Clauses 24 and 25.

The law

It is trite that where parties to an agreement have unequivocally agreed to an arbitration clause, and the dispute falls squarely within the ambit of such clause, the court must stay proceedings and refer the matter to arbitration.[2] It is further trite that this court has inherent jurisdiction to deal with any matter, and that such jurisdiction will not be lightly interfered with.

Therefore, it is only when an arbitral clause is clear and unequivocal that arbitration must be resorted to in the first instance to resolve a dispute, thus ousting the jurisdiction of the court [3]. Finally, it is also trite that a dispute must exist in order to trigger referral to arbitration.[4]

And for a dispute to be said to exist, it must be clear in the pleadings, and cannot be assumed or presumed from the fact of entry of appearance to defend nor be raised in the heads of argument.[5]

Analysis

In casu, it is my view that the defendant totally misconstrued the contract between the parties.

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[2] See *Edgars Stores Managers Association v Edgars Stores Ltd* SC 103/04
[3] See *Shell Zimbabwe (Pvt) Ltd v Zimsa (Pvt) Ltd & Anor* 2007 (2) ZLR 366(H)
[4] See Butler & Finsen in *Arbitration in South African Law and Practice.* See also *Zimbabwe Broadcasting Corporation v Flame Lily Broadcasting (Pvt) Ltd t/a Joy TV* 1999 (2) ZLR 448(H*)*
[5] See *Cargill Zimbabwe v Culveham Trading (Pvt) Ltd HH* 42/06

Firstly, as rightly submitted by plaintiff, clause 4 of Annex 3 is not an alternative dispute resolution clause. It merely clothes the project manager with power to make decisions in a representative capacity on behalf of defendant (employer) providing as it does, that he "will decide contractual matters between Employer and Contractor in the role representing the Employer (my emphasis)"

Further clause 24.1 allows the contractor to have a matter referred to adjudication where the Contractor believes that any decision taken by the project manager was outside his authority or was wrongly taken. No congruent power is granted to the Employer to do the same, precisely because the decisions of the project manager are made on behalf of the Employer. There is nothing on the pleadings to show that the contractor disputed any decision of the project manager, let alone that it sought referral of such dispute to an adjudicator.

On the contrary, what we have is a complaint by the contractor that it performed a service for which it has not been paid. Nowhere in the pleadings is there any allusion that the decision not to pay the contractor was made by the project manager or that he had the power to make such a decision, and that such decision or power is disputed.

It is instructive to note that the decisions of the project manager to which clauses 24 and 25 apply pertain only to the supervision of works and administration of the contract. These decisions therefore pertain to issues involving the approval of the program of works, variations thereto, modifications of works and attendant variations and/or increases in costs. *Ergo*, in circumstances where only the disputed decision of the project manager should be referred to adjudication, and ultimately arbitration, there is nothing on the papers to trigger the adjudication process in terms of clause 24 and 25 as the papers reveal no dispute with regards the matters decided by the project manager.

Any alleged dispute being raised at paragraph 15 of the defendant's heads of argument is inappropriate and unacceptable[6] as it has not been raised in the pleadings.

In addition, referral to arbitration in clause 25 is not unequivocal, it being worded in permissive terms thus: "Either party may (my emphasis) refer a decision of the Adjudicator to an Arbitrator…"

Further and in any event, Clause 14 of the contract provides for relief in case of "default" by either party. It seems to me that this is the clause governing issues of breach of contract, as nowhere else in the contract or its annexes is the issue of breach addressed. And

[6] See *Cargill Zimbabwe* (supra)

nothing in clause 14 subjects actions for breach of contract to the provisions of Annexure 3 to the contract. Clause 14 provides as follows:

> " **DEFAULT CLAUSE**
> Should either of the party (sic) to this Agreement default on its obligations and or performs its side of the obligation below expected standards, the defaulting party has 5 days upon notice from the innocent party to rectify the default failing which the innocent party reserves the right to sue for specific performance and/or to cancel the agreement and sue for breach of contract and any consequential damages attendant thereto."

It seems to me therefore that plaintiff was well within its rights, defendant having cancelled the contract, to sue for payment for services rendered and damages for breach. Whether such a claim will succeed is not an issue for me to decide.

Conclusion

I therefore find that, on the papers, there is no dispute that should be referred to adjudication or arbitration in terms of the contract. Only a plea on the merits could possibly elicit such purported dispute. The special plea was therefore prematurely taken.

Further, there is no arbitration clause sufficiently and unequivocally worded to oust the jurisdiction of the court. And ultimately, there is no decision made by the project manager which is being contested and should therefore be referred to adjudication and/or arbitration.

Costs

The defendant having asked for costs on the higher scale on the basis that plaintiff had unnecessarily put defendant out of pocket by approaching the court contrary to the contract between the parties, the plaintiff countered with its own request to be awarded costs on a punitive scale. However, plaintiff gave no justification whatsoever why it should be awarded such higher costs. Costs being in the discretion of the court, it is my view that this is a matter where ordinary costs should follow the result.

Disposition

Consequently, is ordered that the special plea be and is hereby dismissed with costs on the ordinary scale.

Lawman Chimuriwo Attorneys at Law, plaintiff's legal practitioners
Mawere Sibanda, defendant's legal practitioners