TEL-ONE (PRIVATE) LIMITED
v
CAPITOL INSURANCE BROKERS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MAVANGIRA JA & UCHENA JA
HARARE: June 30, 2017 & October 8, 2018

T. Zhuwarara, for the appellant

E.T. Matinenga, for the first respondent

UCHENA JA: The appellant (Tel-One) is a company registered in terms of the laws of Zimbabwe. The respondent Capitol Insurance Brokers (Pvt) Ltd (Capitol) is an insurance broker, company also registered in terms of the laws of Zimbabwe.

Tel-One issued summons in the court *a quo* seeking damages from Capitol for Capitol's failure to secure an insurer to cover its risk in respect of loss of life by Tel-One's employees in the sum of $458,176-00. Capitol filed an exception and a special plea alleging that the summons did not disclose a cause of action and

alternatively that the court *a quo* could not assume jurisdiction before the parties had referred their dispute to arbitration in terms of their agreement.

On the day set for the hearing of the case, and before any evidence was led Counsel for the parties made submissions from the bar after which the court *a quo* granted the following order:

1. "Proceedings are stayed;
2. The parties are referred to arbitration;
3. The plaintiff shall pay the defendant's costs."

Tel-One was aggrieved by the decision of the court *a quo*. It appealed to this court.

The detailed facts of this case are as follows:

On 26 August 2010 Tel-One, floated a tender through the State Procurement Board, inviting registered insurance brokers to bid for the provision of insurance cover to it. The tender required the successful tenderer to enter into a binding contract with the appellant within 14 days of the conveyance of written acceptance of the tender. Capitol submitted its tender for consideration by the State Procurement Board.

By letter dated 14 November 2010, the State Procurement Board advised Capitol that it had won the tender, and was required to enter into a procuring contract. Thereafter, Capitol wrote a letter to Tel-One to which it attached a draft agreement which contained a clause that disputes between the parties would be resolved through arbitration. It is alleged in pleadings that the parties did not sign the agreement but proceeded to perform their respective mandates as set out therein. Capitol sourced for an insurer, Zimnat Life Assurance (Zimnat), and communicated this to Tel-One on 19 November 2010. In fulfilment of its obligations, Tel-One paid premiums for the insurance cover. This is alleged to have been done in the absence of a written agreement.

On 11 January 2011, Capitol's Operations Director wrote a letter to Tel-One informing it that they had removed its Group Life Assurance Scheme from Zimnat and placed it with Altfin Life Assurance with effect from November 2010. In March 2011, Tel-One's Head of Administration wrote a letter to Capitol complaining that some of their employee's beneficiaries were paid less than they were entitled to in terms of the policy. In response Altfin advised Capitol that the beneficiaries were paid the cover limit and it proposed a rate review due to the high number of claims it was

experiencing. Tel-One refused to accept the proposed adjustments. Altfin, withdrew the insurance cover. This too, is alleged to have happened before a contract of insurance had been signed by the parties.

As a result of the withdrawal, Tel-One's risk was left uncovered. It was therefore not indemnified against the deaths of its employees in the sum of $458,176-00. It issued summons in the court *a quo* claiming from Capitol payment of $458,176-00. Capitol raised an exception and a "special plea" in which it averred that:

> "a. The plaintiff's summons is incurably bad and ought to be dismissed with costs as,
> (i) The summons do not comply with the peremptory provisions of Order 3 rule 11 (c) of the Rules of this Honourable Court in that a true and concise statement of the nature of the claim is not set out.
> (ii) It falls foul of the same peremptory provision in that the grounds of the cause of action are also not set out in the summons. As a result it is not clear whether this is a damages claim or a claim for specific performance or indeed any other claim.
> (b) Defendant alleges that the Plaintiff's summons in this regard is incurably bad and on this basis alone Plaintiff's claim ought to be dismissed with costs
> (c) The parties agreed to resolve any dispute arising from their insurance broking relationship by way of Arbitration.
> (d) The plaintiff must first exhaust the dispute resolution measures
> (e) Accordingly, this claim is premature and in any event this Honourable Court has no jurisdiction at this point to resolve the dispute."

In the same plea Capitol, pleaded over to the merits. The parties subsequently attended a pre-trial conference at which the issues raised in the exception and special plea were referred to trial as the first issues to be determined.

At the trial before leading any evidence, Tel-One raised two preliminary points:

1. Whether the special plea/exception was properly before the court because it had not been set down timeously and Capitol had pleaded over to the merits.
2. Whether the special plea/exception was raised late, that is, at the commencement of the trial.

The court *a quo* held that a point of law can be raised at any time during proceedings and that barring the respondent would render r 138 (c) and r 139 (2) redundant. It therefore held that the exception and the special plea were properly before it.

The court *a quo* held that a signed binding contract is not a requirement to giving effect to an arbitration clause but an exchange of documents which confirm the agreement would suffice.

Regarding the submission that evidence should be adduced to prove that there was any such agreement the court *a quo* held that it was not necessary. The court proceeded to decline jurisdiction based on these findings. The court also held in the alternative, that the appellant's summons were defective.

Tel-One appealed to this Court against the court *a quo's* decision on grounds of appeal which raise two issues for the resolution of the dispute between the parties:

1. Whether or not the exception and special plea were properly before the court *a quo*.
2. Whether or not the court *a quo* erred in finding that there was an arbitration agreement when evidence to prove its existence had not been led before it.

I shall deal with these issues in turn.

1. Whether or not the exception and special plea were properly before the court *a quo*.

Mr *Zhuwarara* for Tel-One (the appellant) submitted that the court *a quo* erred in finding that the exception and special plea were properly before it. He submitted that the fact that the respondent pleaded over to the merits meant it understood the

nature of the appellant's claim because one cannot plead to a claim they do not understand.

Mr *Matinenga* for Capitol submitted that the failure to timeously set down the exception and special plea is not a bar to their being determined at the trial. He implored the court to determine the issue and make an adverse order of costs. He further submitted that a point of law can be raised at any time as long as the other party is not prejudiced. He contended that before the trial, the court *a quo* and the appellant's legal practitioners were alerted to these points and it was agreed that they would be resolved during the trial.

In holding that the exception and special plea were properly before it, the court *a quo* said:

> "Equally, it has long been established that a point of law can still be raised and dealt with by the court at any stage, with an adverse order for costs meeting the justice of the case where necessary. More particularly, that a party who did not set a special plea or exception down, but went ahead and pleaded over to the merits should be barred from this recourse is clearly not in consonant with the ordinary interpretation of rule 138 (c) and rule 139 (2) which would be rendered redundant. I therefore agree that the special plea/exception properly fell before me for my consideration."

The court *a quo* correctly interpreted r 138 (c) and 139 (2) of the High Court Rules 1971 which provide as follows:

> "138. When a special plea, exception or application to strike out has been filed—
> (*a*) -------;
> (*b*) --------;
> (*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.
> ***139.*** (1) ----;
> (2) A party who pleads over may be allowed the costs of such plea to the merits even where the case is disposed of without going into such merits."

Rules 138 (c) and 139 (2) clearly mean that a defendant can plead over to the merits and the exception or special plea can be dealt with and be determined at the trial stage. While the pleading over weakens the exception it does not bar the defendant from seeking its determination at the trial stage.

The exception raised by Capitol was essentially to the effect that the summons and declaration were vague and embarrassing. An exception that a summons and declaration are vague and embarrassing strikes at the formulation of the cause of action and its legal validity. In para (a) of its special plea Capitol states:

> "Plaintiff's summons is incurably bad and ought to be dismissed."

It is not directed at a particular paragraph within a cause of action but at the cause of action as a whole, which must be demonstrated to be vague and embarrassing. It is however surprising that Capitol pleaded over to the merits in the same document. This contradicts its assertion that the Appellant's summons was incurably bad and had to be dismissed. In *Jowell v Bramwell-Jones and others* 1998 (1) SA 836 W at 905 E-H, the court commenting on the requirements which ought to be met in order for a party's exception to succeed said:

> "I must first ask whether the exception goes to the heart of the claim and, if so, whether it is vague and embarrassing to the extent that the defendant does not know the claim he has to meet…"

These remarks show that a party who excepts to the summons on the grounds that it does not disclose a cause of action is essentially stating that it does not know what claim it has to meet. It follows therefore that one cannot ordinarily raise an exception and at the same time plead over to the merits. In the case of *Sammys Group (Pvt) Ltd v Meyburgh NO. & Ors* SC-45-15, ZIYAMBI JA commenting on a similar situation said:

> "Having regard to the purpose of the exception which is to remove contradictions and bring clarity to the declaration and summons in order to enable the respondents to plead thereto, it would seem to me to follow that the fact that the respondents had pleaded over on the merits and proceeded to set the matter down for hearing by consent and on defined issues, was an indication that they no longer considered a ruling on the exceptions to be necessary."

This does not mean that an exception cannot be pleaded over, but indicates that pleading over tends to indicate that the excipient understood the plaintiff's claim. In this case Tel-One and Capitol agreed at their pre-trial conference that the exception was to be determined at the trial. It cannot therefore be said that Capitol had by pleading over indicated that it no-longer required the court's decision on its exception.

Capitol's exception to the summons relies on the summons' failure to comply with the provisions of r 11 (c) which requires a summons to include:

> "(*c*) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action."

It is not disputed that Tel-One's summons does not strictly comply with Order 3 r 11 (c). It however sought to deal with the provisions of r 11 (c) by reference to the declaration

which was filed together with the summons. The summons reads as follows:

> "The Plaintiff's claim against the Defendant is for:
> (a) Payment of the sum of US$458 176-00;
> (b) Interest thereon calculated at the prescribed legal rate from the date of issue of summons to the date of payment in full; and
> (c) Costs of suit.
> **As more fully appears from the Plaintiff's declaration annexed hereto.**" (emphasis added)

It should be noted from the words "As fully appears from the plaintiff's declaration annexed hereto", that the provisions of Order 3 r 11 (c) were not disregarded. They were incorporated by reference to the declaration which was attached to the summons. Rule 11 (c) should be read together with r 109 which provides for a declaration. Rule 109 reads:

> ***"109.*** The statement of the plaintiff's claim shall be called his declaration, and it shall state truly and concisely the name and description of the party suing and his place of residence or place of business, and if he sues in a representative capacity, the capacity in which he sues, the name of the defendant and his place of residence or place of business, and if he is sued in a representative capacity, the capacity in which he is sued **and the nature, extent and grounds of the cause of action, complaint or demand.**" (emphasis added)

A declaration is the plaintiff's statement which among other things states truly and concisely "the nature, extent and grounds of the cause of action, complaint or demand". It therefore incorporates the requirements of r 11 (c). It cannot therefore be said that the information required by r 11 (c) was omitted. It was in my view provided by reference to the declaration. The court *a quo* seems to have appreciated this when it on page 12 of its judgment said:

> "While I am not impressed with the standard of drafting of the declaration in this case, **I would not have been prepared to rule that the declaration was, on the face of it, fatally defective as all the elements (the nature, extent and grounds of cause of action and relief sought) are evident.** However, since there was no brokerage agreement between the parties as required by the tender, the plaintiff's claim has no legal basis to stand on, as the requisite branch of law (contract law) is in my view not applicable." (emphasis added)

Once it is accepted that the summons and declaration disclosed the plaintiff's cause of action it cannot be said that the summons which was served together with the declaration is excipiable.

According to the Joint Pre- Trial Conference Minute the issues which should have been dealt with as preliminary issues are:

1.1 Whether or not plaintiff's claim should be dismissed with costs on account of a defective summons.
1.2 Whether or not plaintiff's claim should be dismissed on account of lack of jurisdiction.

It is therefore clear that the court *a quo* misdirected its self when it without hearing any evidence ruled that because there was no **brokerage agreement "the Plaintiff's claim has no legal basis".** That issue was according to issues 1.3 to 1.5 in the pre-trial conference minute to be determined after hearing evidence during the trial. This is especially so as the parties had apparently acted in terms of the alleged unsigned agreement.

2. Whether or not the court *a quo* erred in finding that there was an arbitration agreement.

On the issue of jurisdiction, Mr *Matinenga* argued that the court *a quo* had no jurisdiction to determine the matter as the parties had agreed that any dispute would be resolved through arbitration. He submitted that there was an exchange of documents, and letters between the parties in which an arbitration clause was clearly spelt out.

Mr *Zhuwarara* for Tel-One submitted that there was no signed binding contract and thus there was no agreement. Mr *Matinenga* contended that the unsigned contract and documents satisfied the requirements of Article 7(2) of the model law contained in the schedule to the Arbitration Act *[Chapter 7:15]*. Article 7 (2) provides:

> "(2) The arbitration agreement shall be in writing. An agreement is in writing if it is **contained in a document signed by the parties or** in an exchange of letters, telex, telegrams or other means of telecommunication **which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.** The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." (emphasis added)

Article 7 (2) provides for a situation where the parties, instead of relying on a signed contract that has an arbitration clause, can rely on the argument that an arbitration agreement exists on the basis of other communications which proves that it exists. Mr *Zhuwarara* submitted that even if it were to be accepted that there was an unsigned agreement, evidence should have been led to prove that the parties agreed that disputes should be referred to arbitration.

Mr *Zhuwarara* for Tel-One submitted that the court *a quo* grossly misdirected itself in finding that the parties had agreed to refer any dispute to arbitration in the absence of any formally admitted evidence.

In making a determination that the parties had agreed to refer any dispute between them to arbitration, the court *a quo* made reference to Article 7 (2) of the Arbitration Act outlined above. As already stated the provision makes it clear that a court can accept that there was an arbitration agreement if a statement to that effect is contained in an agreement signed by the parties, or recorded in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement or in an exchange of statements of claim or defence in which it is alleged by one party and not denied by the other.

The court *a quo* noted that there was no signed or written contract but relied on exchanges between the parties to come to a conclusion that there was an arbitration agreement. Mr *Zhuwarara* for Tel-One submitted that the court *a quo* misdirected itself when it accepted and relied on documents in the parties' bundles of documents when they had not been tendered and accepted as evidence. He submitted that documents in the parties' bundles of documents

cannot be relied on when no evidence was led to introduce them as evidence before the court. The court *a quo* commented on its reliance on these documents as follows:

> "Nor do I agree that it is necessary to lead evidence that the unsigned agreement is binding on the plaintiff, as that would defeat the clear provisions of Article 7 (2). Clearly, by adopting Art 7(2) of the Model Law as is, the legislature intended that the meaning and interpretation ascribed to it internationally should prevail."

It is therefore common cause that the court *a quo* did not rely on evidence led before it. It considered it unnecessary and proceeded to rely on documents which were in the parties' bundles of documents. This is confirmed by Mr *Matinenga*'s address from the Bar on page 411 which referred it to pages 134 and 135 of the defendant's bundle of documents, and Mr *Zhuwarara*'s address on page 416 where he pointed out the irregularity.

Mr *Zhuwarara* further submitted that the court *a quo* predicated its order on findings and conclusions stemming from documents and copies of emails which had not been admitted or formally tendered into evidence. The fact that the parties agreed to resolve any dispute arising from their insurance broking relationship by way of arbitration was raised through a special

plea. As pointed out by GILLESPIE J in *Doelcam (Pvt) Ltd* v *Pichanick & Others* 1999 (1) ZLR 390(H), at 396 the purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim.

A factual issue which forms the basis of a legal argument should be proven through the leading of evidence before the court. *Herbstein & Van Winsen in* "The Civil Practice of the Supreme Court of South Africa" (4th ed.), at pp. 471-472 in explaining the essential differences between an exception and special plea, and articulating the need to adduce evidence in the case of a special plea said:

> "The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence he raises on exception must appear from the declaration itself; he must accept as true the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the declaration. If they did, then the exception procedure would have to be followed. **Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration, and those facts have to be established by evidence in the usual way. Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect.** The defence of prescription appears to be an exception to this rule, for it has been held that that defence should be raised

> by way of special plea even when it appears *ex facie* the plaintiff's particulars of claim that the claim has prescribed, apparently because the plaintiff may wish to replicate a defence to the claim of prescription, for example an interruption." (emphasis added)

The same difference was stated by BEADLE CJ in the case of *Edwards v Woodnut NO* 1968 (4) SA 184 (R) in which he stated the following at page 186:

> "the basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement **evidence must be led**, whereas in the case of an exception the facts stated in the pleadings must be accepted." (emphasis added)

It is clear from the authorities cited above that in the case of a special plea, evidence ought to be led and such evidence is adduced under oath. In *casu*, the evidence relied on as proof that there was an arbitration agreement was not led under oath, through oral evidence or through an affidavit nor admitted by consent. In *H & Dwitkoppen Agencies & Fourways Est v De Sousa* 1971 (3) SA 941 TPD, it was held at page 940E that:

> "The law in relation to the proof of private documents is that they must be identified by a witness who is either (i) the writer or signatory thereof; or (ii) the attesting witness, or (iii) the person who found it in possession of the opposite party, or (v) a handwriting expert, unless the document is one which proves itself, that is to say unless it:
> (1) Is produced under a discovery order, or
> (2) May be judicially noticed by the court, or

(3) Is one which may be handed in from the Bar, or
(4) Is produced under a subpoena *duces tecum*, or
(5) Is an affidavit in interlocutory proceedings, or
(6) Is admitted by the opposite party."

In *casu*, the court *a quo* admitted as evidence documents which were in the parties' bundles of documents. Mr *Matinenga*, for Capitol, submitted that these documents were undisputed therefore it makes no difference whether the evidence was properly admitted or not. Mr *Zhuwarara* submitted that they were disputed and should have been properly admitted through the leading of evidence before the court *a quo.* As highlighted above, evidence can only be led through a witness, through an affidavit or is admitted by consent of the other party. A court cannot accept documents in a bundle of documents as evidence if they have not been properly tendered as exhibits. The mere fact that they are before the court does not mean that they can be relied on as evidence. Evidence must be led to officially place those documents before the court as exhibits unless they have been tendered and admitted with the consent of the other party.

The finding of the court *a quo* that there was an arbitral clause in the contract is therefore erroneous and ought to be

interfered with, because it was arrived at in the absence of properly adduced evidence. It should therefore be set aside.

In the result, the following order is made:

1. The appeal is allowed with costs
2. The order of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo:*
   (i) for the hearing of evidence on whether or not there was an agreement to resolve disputes between the parties by way of arbitration.
   (ii) for the hearing and determination of the plaintiff's claim on the merits if there is no arbitration agreement.

GWAUNZA JA I agree

MAVANGIRA JA I agree

Dube Manikai & Hwacha, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners