CONPLANT TECHNOLOGY [PRIVATE] LIMITED
versus
WENTSPRING INVESTMENTS [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 & 28 September 2015, 16 December 2015

Civil Trial – Arbitration Clause

B Diza, for the plaintiff
D Tivadar, for the defendant

MAFUSIRE J: The trial in this matter was held up by a preliminary argument on a special plea. The central question was whether or not the trial should be stayed and the matter referred to arbitration in terms of an arbitration clause in the contract between the parties upon which the plaintiff sued the defendant. I reserved judgment. This now is my judgment.

The plaintiff's claim was for payment of a sum of money in respect of labour and materials supplied to, for and on behalf of the defendant, at the defendant's special instance and request. The allegations were that following a written contract between the parties, the plaintiff had been contracted by the defendant to install a water pump station, to procure and install water pumps thereat, and to connect them to an existing water reticulation system. The plaintiff claimed it had done the job in accordance with the contract but that the defendant had neglected to pay. The cost of labour and material amounted to US$32 960. The plaintiff also said it was due a commission in the sum of US$3 296. It issued summons for payment of these two amounts.

The defendant filed a joint special plea and plea on the merits. In the special plea, it said there was an arbitration clause in the agreement that obliged the parties to settle any dispute between them by arbitration. On the merits, it said there was a dispute. In essence and in summary, the defendant averred that contrary to its obligations in terms of the contract, the plaintiff had circumvented the local authority in the procurement of the water pumps; that despite holding itself out as the expert in the field, the plaintiff had procured the wrong

pumps; that the pumps had been rejected by the local authority and that owing to such breach by the plaintiff, the defendant had cancelled the contract.

The plaintiff's responses to the defendant's special plea on arbitration were fourfold. The first two appeared in the replication, and the last two in the written submissions or heads of argument.

The first ground relied upon by the plaintiff to resist a referral to arbitration was that the defendant could not be heard to want to rely on, and benefit from, the arbitration clause in the contract when it had itself ignored it prior to its purported cancellation of the contract.

The plaintiff's second ground was that the arbitration clause in the contract could not be read as ousting the inherent jurisdiction of this court and that the defendant's objection was purely academic.

The plaintiff's third ground was predicated on the decision of this court in *Shell Zimbabwe [Pvt] Ltd* v *Zimsa [Pvt] Ltd*[1]. It was argued that the arbitration clause in the agreement had not been intended by the parties to be the procedure of first instance in, or the primary forum for, resolving disputes, because in that contract, arbitration had to be preceded by adjudication and that arbitration was an appellate process. As such, it was argued, the arbitration clause could not have the effect of forcing, or persuading the court, to exercise its discretion in favour of referring the matter to arbitration.

The plaintiff's fourth and last ground in resisting a referral to arbitration was that even if it had wanted to, the arbitration clause was incapable of being complied with because the adjudicator that had been appointed in the contract, a firm of engineers, was conflicted in that it also happened to be the defendant's own consulting engineers and, therefore, the defendant's agent. Such an adjudicator could not be expected to be impartial or unbiased.

To the plaintiff's first ground that the defendant had itself breached the arbitration clause by purporting to cancel the agreement without reference to arbitration, the defendant's response was that what would be referred to arbitration was a "***dispute***". Cancellation was not a dispute. The defendant had had no cause to refer to arbitration.

To the plaintiff's second ground that the arbitration clause could not have the effect of ousting the court's inherent jurisdiction, the defendant's reply was that it was not about ousting the jurisdiction of the court, but about enforcing the contract between the parties.

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[1] 2007 [2] ZLR 366 [H]

To the plaintiff's third ground that, in line with the decision in *Shell Zimbabwe [Pvt] Ltd* v *Zimsa [Pvt] Ltd*, *supra*, that in the contract, arbitration was not the procedure of first instance in the dispute resolution, the defendant argued that that case had been wrongly decided because the decision had run counter to the settled legal position and that it had to be confined to its own set of facts. The defendant cited cases of its own to support its position. Those cases held that where there is an arbitration clause in a contract, the court has to refer the dispute to arbitration if one or other of the parties makes such a request. The cases cited by the defendant included *Independence Mining [Pvt] Ltd* v *Fawcett Security Operations [Pvt] Ltd*[2]; *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting [Pvt] Ltd*[3]; *PTA Bank* v *Elanne [Pvt] Ltd & Ors*[4] and *Capital Alliance [Pvt] Ltd* v *Renaissance Merchant Bank Ltd & Ors*[5].

To the plaintiff's fourth ground that it could not comply with the arbitration clause because the adjudicator was conflicted, the Defendant said that the plaintiff could have easily moved for the appointment of a neutral adjudicator and that, indeed, that is what the plaintiff itself had proposed in its own correspondence.

I now deal with all the issues as follows:

[a] **Arbitration clause in a contract**

Article 8[1] of the Model Law, the First Schedule to the Arbitration Act, [*Chapter 7: 15*], states:

> "A court of law 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."

In my view, and in my own words, it is now settled that a clause in a contract to refer a dispute to arbitration is binding on the parties. A party is not at liberty to resile from that clause any time he may wish to do so. In terms of Art 8 of the Arbitration Act, where a party makes a timeous request for referral to arbitration, the court has to stay the matter and refer

[2] 1991 [1] ZLR 268 [H]
[3] 1999 [2] ZLR 448 [H]
[4] 2000 [1] ZLR 156 [H]
[5] 2006 [2] ZLR 232 [H]

the dispute to arbitration unless the agreement is null and void, or is inoperative or is incapable of being performed: see *Zimbabwe Broadcasting Corporation* v *Flame Lily Broadcasting Services [Pvt] Ltd*, *supra*; *Waste Management Services* v *City of Harare*[6] and *Capital Alliance [Pvt] Ltd* v *Renaissance Merchant Bank Ltd & Ors*, *supra*.

Thus, the one condition in Art 8 for referral is that there must exist a dispute between the parties. In *PTA Bank*, where the defendant had merely asked for further particulars - which had been furnished - but had not said anything else about the existence or otherwise of a dispute, except in counsel's heads of argument, the court declined the request for referral. It said that, among other things, since no dispute had been established, there was nothing to refer to arbitration.

In *Zimbabwe Broadcasting Corporation* the court initially declined to refer the matter to arbitration where the defendant had merely made the request before pleading to the merits. It was only upon the defendant's pleading to the merits that a dispute became apparent, thereby leading the court to exercise its discretion in favour of staying the proceedings and referring the dispute to arbitration.

In casu, the defendant met the one condition referred to above. It has pleaded on the merits. There has emerged a clear dispute. It is this: is the plaintiff entitled to payment? Did it breach the contract by circumventing the local authorities? Did it supply the wrong pumps?

Another condition in Art 8 of the Arbitration Act for referral to arbitration is that the request for such referral must be made timeously. The article says it must be made "…*not later than when submitting … [the]… first statement on the substance of the dispute*." The defendant filed a special plea, in which the request of referral was made, and, in the same document, pleaded over to the merits, setting out the dispute. Therefore, this other condition was also met.

Yet another condition in Art 8 of the Arbitration Act for referral to arbitration is that the arbitration agreement must not be null and void, or inoperative or incapable of being performed. It was common cause that this was not the case in this matter. It did not form part of the plaintiff's grounds for resisting referral. At any rate, the question whether the dispute between the parties to a contract falls within the ambit of an arbitration clause is primarily a question of interpretation of the agreement, in particular, the arbitration clause itself: see *Independence Mining*; *PTA Bank* and *Zimbabwe Broadcasting Corporation*, *supra*.

[6] 2000 [1] ZLR 172 [H]

Furthermore, once it is established that the dispute falls within the ambit of the arbitration clause, the onus to show why the court proceedings should not be stayed rests on the party challenging the reference to arbitration, i.e., the plaintiff in this case: see *Capital Alliance [Pvt] Ltd*.

I now deal with the plaintiff's four grounds for refusal to go to arbitration.

[b] **The defendant itself breached the arbitration clause when it purported to cancel the agreement**

I understood counsel's argument on the point to be that if the defendant felt that the plaintiff had been in breach of the contract, it ought to have referred the matter to arbitration instead of just taking it upon itself to cancel. The plaintiff, having decided to issue summons out of this court without first having gone for arbitration, it hardly lay in the mouth of the defendant to cry foul.

Even though it did not exactly put it that way, the plaintiff was probably saying what is good for the goose should be good for the gander also, or, an eye for an eye. But this hardly constitutes sound legal argument. Two wrongs do not make a right. At any rate, having accepted the existence of the arbitration clause, the onus lay on the plaintiff, as the party resisting arbitration, to show why the matter should not be stayed and referred to arbitration. The plaintiff could hardly shift that onus by merely pointing to an alleged earlier breach by the defendant.

Since the plaintiff did not say exactly that, was it then implying or insinuating that the parties had, or should be deemed, by their conduct, to have tacitly abandoned arbitration in favour of a direct approach to a court of law? In *Bitumat Ltd* v *Multicom Ltd*[7], this court [per SMITH J] said this[8]:

> "It may well be that at some stage after the dispute has arisen, because of changed circumstances, the parties concerned agree that the matter should be determined by a court of law, rather than by arbitration in terms of the agreement in question. In these circumstances, the decision of the parties to abandon the arbitration clause in their agreement must be specific and clearly evidenced. It cannot be implied by the conduct of, or correspondence between the parties – it must be explicit. After all, if the arbitration clause is contained in a written agreement, then the decision to change the agreement must either be in writing or else so clearly evidenced by the conduct of the parties that there is no room for doubt."

[7] 2000 [1] ZLR 637 [H]
[8] At 640A - C

It would have been far-fetched for the plaintiff to have even remotely suggested or implied that the parties had tacitly agreed to abandon arbitration in favour of a direct approach to this court. There was nothing of the sort. The defendant simply decided that the plaintiff had breached the contract. It did not perceive a dispute. The contract provided for cancellation by the employer, i.e. the defendant, on the happening of certain events. The defendant had cancelled. That is not to say it was right. But if the plaintiff felt that it was not right, and it wanted the matter adjudicated upon, then it had to follow the dispute resolution mechanism provided for in the contract. This entailed the dispute being referred for adjudication in the first place, and then followed by arbitration if adjudication did not resolve it.

So on this basis, the plaintiff's first ground for resisting arbitration cannot succeed.

There is also another reason, from the peculiar facts of this case, why the plaintiff's first ground for resisting arbitration could not succeed. It was common cause between the parties that in correspondence, well before issuing out a summons, the plaintiff, firstly by itself, and subsequently through its erstwhile legal practitioners, had given the defendant ultimatums within which to pay the disputed amount failing which it would refer the matter to arbitration. In its own letter to the defendant, the plaintiff had written, in part, as follows:

> "We therefore give you seven [7] days' notice from today's date to effect payment as per attached invoices or allow us to install the said pumps and pump accessories after which we will be forced to refer this case to an arbitrator agreed to by both parties to resolve the stalemate. From this end we can think [of] none other than the current President of Zimbabwe Institute of Engineers considering that the despite [sic] is centred on engineering interpretations."

In the letter from the plaintiff's erstwhile legal practitioners to the defendant, exactly one year later, was the following:

> "In that regard, in the event that this amount is not paid within the period aforesaid, this letter serves as notice that this matter will be referred to an adjudicator for settlement. We note, in this respect, that your consulting team [CGM] has also been appointed as adjudicators as well as administrators of the contract. The parties will have to agree on an independent adjudicator."

At the hearing, Mr *Diza*, for the plaintiff, gave no coherent explanation why the plaintiff, having displayed such conscious attention to detail, would subsequently veer from the course of action that it had threatened and come straight to this court.

In the premises, the plaintiff's first ground to resist arbitration is hereby dismissed.

[c] **Arbitration was not intended to oust the inherent jurisdiction of this court**

This ground is plainly misconceived. The issue is not about the ousting of the inherent jurisdiction of this court. It is about enforcing a contractual provision. By agreeing to arbitration, the parties select a dispute resolution mechanism alternative to litigation through the conventional courts. As said above, a party is not at liberty to resile at any time he may wish to do so from a clause in a contract obliging them to refer disputes to arbitration. Thus, this second ground for resisting referral to arbitration is without merit. It is hereby dismissed.

[d] **Arbitration was not the dispute resolution procedure of first instance: The decision in *Shell Zimbabwe [Pvt] Ltd* v *Zimsa [Pvt] Ltd & Anor***

On this ground, the plaintiff simply relied on the decision of this court in *Shell Zimbabwe [Pvt] Ltd, supra*. Such a stance was understandable because the circumstances of this case are somewhat on all fours with those in that case.

The arbitration clause in the *Shell Zimbabwe* case, in part, read as follows:

> "14.1 Any dispute, question or difference arising at any time between the parties to this agreement out of or in regard to any matter arising out of the rights and duties of the parties hereto, or the interpretation of or the rectification of this agreement shall in the first instance be submitted to and decided by mediation on notice given by either party to the other in terms of this clause.
>
> 14.2 ……..
>
> 14.3 In the event that mediation does not resolve the dispute within seven days time period referred to in sub-clause [2] above, and the parties fail to agree on extended time for mediation, then either party shall be entitled to refer the matter to arbitration, which shall be conducted in terms of the rules and procedures set out in the Arbitration Act of Zimbabwe."

In the present case, the arbitration agreement was cast as follows:

> "42.1 Any dispute arising out of this agreement shall be resolved in accordance with this clause.

42.2 ……
42.3 When any dispute referred to in clause 42.1 arises, which cannot be resolved between the parties, it shall be referred in writing to and settled by the adjudicator.

42.4 ……..
42.5 ……..

42.6 The adjudicator settles the dispute as an independent adjudicator and not as an arbitrator. The adjudicator's decision is enforceable as a matter of contractual obligation between the parties.
42.7 ……
42.8 ……
42. 9 ……
42.10 If, after the adjudicator notifies the decision, a party is dissatisfied, that party may give notice to the other party of an intention to refer the matter to arbitration.
42.11 ……
42.12 ……
42.13 No matter may be referred to arbitration that has not previously been the subject of a decision by the adjudicator.
42.14 ……
42.15 ……
42.16 ……"

Thus, whilst in the *Shell Zimbabwe* case the parties preferred the term "***mediation***" as the process to precede arbitration, *in casu* they preferred "***adjudication***."

In *Shell Zimbabwe* MAKARAU JP, as she then was, stressed the inherent jurisdiction of this court, and the readiness with which it must hold itself out to dispense justice to all those who seek it. The learned Judge President refused to stay the proceedings for reference to arbitration. The *ratio decidendi* of her Ladyship's decision seemed two-pronged. The one was that for an arbitration clause in an agreement to have the effect of staying court proceedings in terms of the Arbitration Act, the clause must be clear and unequivocal, and the parties must intend arbitration to be the procedure of first instance in resolving their dispute. The other was that the jurisprudential grounds underlying arbitration as an alternative dispute resolution mechanism are, firstly, the apparent speed with which arbitration can yield results, and, secondly, the contractual autonomy of the parties, *inter alia*, to resolve differences that may occur between them as they perform their obligations under the contract.

In the final analysis, the court held that the parties did not intend arbitration to be the first choice dispute resolution mechanism since they had chosen mediation in the first instance. The court went further to suggest that the agreement between the parties was one subject to a mediation clause, as opposed, I presume, to an arbitration clause.

With the greatest of respect, I find myself unable to agree with the approach in *Shell Zimbabwe*. In my view, to sever mediation, as in the *Shell Zimbabwe* case, or adjudication, as in the present case, from arbitration, and treat the processes as two distinct and stand-alone dispute resolution mechanisms in their own right, cannot be correct. It is true that in the present case the arbitration agreement said that the adjudicator's decision would be enforceable. However, this statement must not be read in isolation. The sub-clause went further to say, enforceable "***…as a matter of contractual obligation between the parties***." In other words, and in my view, there was a consciousness by the parties, in selecting that kind of wording, that adjudication was not by itself the end process the outcome of which could be enforced through the judicial process as one would with an arbitral award. Rather, mediation, or adjudication, was merely a means to an end. Mediation, or adjudication, was the footpath to arbitration. No party entered arbitration except through mediation or adjudication.

The above point seems fortified by the sentence that preceded the statement about the adjudicator's decision being enforceable. It said the adjudicator settled the dispute "… ***as an independent adjudicator and not as an arbitrator***." In other words, the parties were alive to the fact that adjudication, on its own, was not a dispute resolution mechanism. If it failed, the matter would have to be referred to arbitration. Adjudication could be cheaper, quicker, simpler, less formal and more expedient in the resolution of less contentious disputes. The parties obviously wished to give themselves that opportunity.

I consider that an adjudication, or mediation process, would be like a pre-trial conference in a trial procedure. Parties meet before a third party – i.e. adjudicator, mediator, or Judge in Chambers. The third party acts as an umpire. The proceedings are less formal. The major aim is to enable the parties themselves to settle the dispute, after affording them an equal chance to ventilate their respective sides of the case. Failing settlement, the adjudication, or mediation, or pre-trial process, identifies and streamlines the real issues for final determination by arbitration or trial. It is only the outcome of the arbitration process, or of the trial, that is eventually enforceable through the judicial process.

As far as the pre-arbitration process was concerned, i.e. mediation in the *Shell Zimbabwe* case, and adjudication in the present case, I perceived no material difference. The adjudication clause in the present case was just cast in more elaborate terms than the mediation clause in the *Shell Zimbabwe* case.

In the *Shell Zimbabwe* case, it was noted that whilst arbitration resolved disputes faster than the litigation route, it seemed not to have been the case in that particular matter. I agree, with respect, with the jurisprudential bases underlying the place and role of arbitration as identified by the learned Judge President. However, I would also think and add that arbitration agreements are generally industry specific. In the *Shell Zimbabwe* case, the agreement was in respect of the lease of an oil station. In *Capital Alliance [Pvt] Ltd* it was in relation to multiple commercial transactions concerning the transfer and pledge of multiple classes of shares in multiple transactions that included debt equity swap arrangements. In *Zimbabwe Broadcasting Corporation* the agreement was in respect of the rates for air time on a broadcasting channel and the installation of a transmitter for the enhancement of broadcasting signals. In the present case, the agreement was in respect of the installation of a pump station and suitable water pumps to be connected to the main water reticulation system.

In my view, being industry specific, arbitration may be a more expedient dispute resolution mechanism in that, among other things, experts in the fields concerned would generally be chosen for their technical know-how, expertise and experience to constitute the arbitration tribunal. Of course, ultimately, the courts always deal with legal issues stemming from such disputes. However, I imagine that experts in their fields can readily appreciate and blend factual issues much faster, thereby expediting the whole process.

Apparently, that an arbitration agreement can make some other process, such as mediation or adjudication, a condition precedent to arbitration, is not uncommon. In *Waste Management Services, supra,* the arbitration agreement said any dispute between the parties had to be referred to an employee of the client first, i.e. the Director of Works, for "… ***his or her decision in writing …***", the client being the City of Harare. The City of Harare had contracted the plaintiff to undertake its waste management services for a fee. The agreement provided that such decision by the Director of Works would be binding upon the Contractor who was obliged to give effect to it forthwith. Only if the Contractor was dissatisfied with the decision could it request that the issue be referred to arbitration. The Contractor sued the City of Harare for payment of the unpaid fees. The City of Harare invoked the arbitration clause and sought a stay of the proceedings. The Contractor resisted a referral on the basis that, *inter alia*, to the extent that the arbitration clause required the dispute to be referred first to the Director of Works for his decision, it was contrary to the common law rule of natural justice *nemo judex in sua causa* [no man shall be judge over his own cause] since the Director of

Works was unlikely to be impartial and unbiased. SMITH J dismissed that argument in the following terms[9]:

> "Can it be said that clause 25 of the agreement is contrary to public policy? Had the clause provided that any dispute between the parties was to be referred to the Director of Works and his or her decision would be final, then clearly the clause would be contrary to public policy."

And at p 177B – C the learned judge continued as follows:

> "The function of the Director of Works under clause 25[a] of the agreement is to try to settle the dispute which has been referred to him. Although it is provided in para [a] of clause 25 that his or her decision shall be binding on WMS and shall forthwith be given effect to by WMS, para [b] goes on to gainsay that provision. It provides that if WMS is dissatisfied with the decision of the Director of Works, it may require that the issue be referred to an arbitrator. Paragraph [a] of clause 25 of the agreement, read by itself, would undoubtedly be contrary to public policy. Since, however, para [b] of that clause remedies the objectionable part of the paragraph, I do not consider that the clause can be regarded as being contrary to public policy."

In that case the request for referral to arbitration was granted, the court holding that in terms of the Arbitration Act, it had no discretion to decide not to where one party requests the referral and where it is provided for in the contract.

I agree with the approach in *Waste Management Services*. On this particular point, I see no difference between that case and the one before me. In the circumstances, I find that the plaintiff's third ground for resisting a referral to arbitration on the basis that, in the agreement between the parties, arbitration was not the intended procedure of first instance in the dispute resolution mechanism, was unsound. I hereby dismiss it.

[e] **Plaintiff could not comply with the arbitration agreement because the adjudicator was conflicted**

By raising this ground, the plaintiff was undoubtedly trying to hide behind a finger. My reasons for saying this are two-fold. Firstly, the parties must have anticipated the adjudicator being conflicted in that it was at the same time the administrator of the contract. So they had made provision for such a conflict of interest. Clause 42.8 of the agreement read as follows:

[9] At pp 175H

> "If the adjudicator resigns, dies, **is otherwise unable to act**, [my emphasis] or fails to issue a decision as provided for under the NJPC adjudication rules either party shall apply to the NJPC for the nomination of a new adjudicator or the NJPC shall appoint a new adjudicator. The new adjudicator has power to settle disputes that were currently submitted to the predecessor, but had not been settled. Disputes previously settled may not be re-opened before the new adjudicator."

There was nothing stopping the plaintiff from causing the appointment of a replacement adjudicator. In fact – and this is my second reason for saying the plaintiff was trying to hide behind a finger – in its two letters referred to above, the plaintiff had actually proposed an alternative adjudicator. Why this was not followed through has not been explained.

Thus, the plaintiff's fourth and last ground for resisting arbitration, like the rest of them, also lacks merit. It is hereby dismissed.

None of the parties addressed me on the question of costs. None of them sought them. Therefore, none shall be awarded.

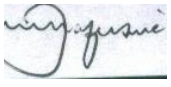
DISPOSITION

1 The proceedings in HC 1 033/15 are hereby stayed.

2 The dispute between the parties in the above case is hereby referred for resolution by arbitration in accordance with the provisions of the agreement between the parties under the NJPC 2000 Building Direct Contract dated 30 August 2011.

3 Costs shall be in the cause.

16 December 2015



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