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

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 26 October, 1 December 2015 & 13 January 2016

Civil Trial

T Zhuwarara, for the plaintiff
E T Matinenga, for the defendant

CHAREWA J: The plaintiff, through the State Procurement Board (SPB), floated a tender inviting registered insurance brokers to bid for the provision of insurance cover on 26 August 2010. It was a requirement of the tender that the successful tenderer had to enter into a binding contract with the plaintiff within 14 days of the conveyance of written acceptance of the tender. The defendant, a registered insurance broker, won the tender and written acceptance was conveyed to it by SPB on 14 November 2010 with the instruction that the parties should proceed to enter into the necessary procuring contract.

In terms of para 6.8 of the tender, such contract was required to include "the Tender, the Conditions of Contract, the Schedules, and all documents to which reference may properly be made in order to ascertain the rights and obligations of the parties" including any agreed and written alterations. In case of failure to sign the contract and furnish a performance security, the successful bidder was liable to forfeit its bid security.

The tender documents also included a pro-forma agreement between the insured (plaintiff) and the insurer, which contract would only come into force after it was signed by the parties (See p 116, para12 of the plaintiff's bundle).

In the absence of the required contract between the parties aforesaid, duly signed and attested, the plaintiff and the defendant proceeded to purport to perform their respective mandates. The defendant sourced for an insurer, Zimnat Life Assurance (Zimnat), and communicated this to the plaintiff on 19 November 2010. For its part, the plaintiff paid the

required premiums. This too was done in the absence of the required written and signed contract between the plaintiff and the insurer.

By 11 January 2011, problems were manifest, with Zimnat withdrawing from the risk on the basis that there was never agreement between it and the plaintiff, as its offer had not been accepted by the plaintiff. The defendant sought to place the risk with Altfin Life Assurance (Altfin). However Altfin demanded an upward adjustment to the premium rates or a reduction of the benefit. When the plaintiff refused to accept such adjustments, Altfin also withdrew from providing cover, this too before a contract of insurance was entered into.

The outcome was that the plaintiff's risk was left unsecured such that it was not indemnified against deaths of its staff in the amount of $458,176-00. It therefore sued the defendant for payment of this sum.

The defendant raised a "special plea" that:

a) the plaintiff's summons is incurably bad and ought to be dismissed with costs as
    i. it did not comply with the peremptory provisions of Order 3 (11) (c) in that a true and concise statement of the claim was not set out, and that
    ii. The grounds of the cause of action were not set out such that it was not clear whether the claim was for damages or specific performance or any other claim
b) the dispute ought to be referred to arbitration and therefore the Court had no jurisdiction.

As a result of these preliminary points of law raised in the plea, the first two issues distilled in the joint pre-trial conference minute were:

1. whether or not the plaintiff's claim should be dismissed with costs on account of a defective summons; and
2. whether or not the plaintiff's claim should be dismissed on account of lack of jurisdiction as the matter ought to have been dealt with by way of arbitration.

At the commencement of the trial the defendant refined the first issue, which goes to cause of action to include the question:

a. whether, where an insurer decides that a risk is not worth carrying, the plaintiff could properly have a cause of action against defendant, a broker; and
b. further raised the issue that the plaintiff's claim was excipiable for failing to join the insurer to the proceedings.

It was my view that, save for the plea of lack of jurisdiction, the points raised were in fact exceptions. Further all these issues had the potential to stop the litigation in its tracks. I therefore directed the parties to file heads of argument thereon on which I would render a ruling before proceeding to the merits, if necessary. Issue 1 and a., speak to the same point: whether or not the summons is so defective that it discloses no cause of action in terms of the rules and may be dealt with together.

I will deal with the issue of joinder first, as my decision may require the stopping of the trial to permit service of process and filing of further pleadings. Secondly, I will deal with the issue of lack of jurisdiction, as a finding that the matter ought to be referred to arbitration will require that proceedings be stayed, regardless of whether or not the summons discloses a cause of action.

ARE THE PRELIMINARY ISSUES PROPERLY RAISED BEFORE THE COURT

Before delving into the exceptions and special plea proper, it is necessary to briefly dispose of two questions raised by the plaintiff. Firstly, whether the defendant, where it raised its "special plea"/exceptions timeously, but failed to set them down and went ahead to plead over to the merits, should be barred from having them heard. Secondly, whether the defendant was entitled to raise its exceptions late, i.e. at the commencement of the trial.

It was the plaintiff's assertion, which was not seriously pursued, that the defendant's "special plea"/exceptions ought to have been raised timeously, and set down for disposal before pleading over to the merits, well before the date of trial.

The defendant conceded that it did not set down its "special plea" as required by the rules, nor raise some of its exceptions timeously, but argued that such failure is not a bar from being heard on them. Rather, relying on *Edward L. Bateman Ltd* v *C.A. Brand Projects (Pty) Ltd* 1995 (4) SA 128 at 140 F-G, which was summarized with approval in the 5th ed of Herbstein & Van Winsen at p 645, the defendant argued that the Court should deal with the issue and may make an adverse order for costs.

It is trite that an exception must be raised timeously and set down for argument before trial. See *Harare City* v *D & P Investments (Pvt) Ltd & Anor* 1992 (2) ZLR 254(S). 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 r 138 (c) and r 139 (2) which would be rendered redundant.

I therefore agree that the special plea/exceptions properly fell before me for my consideration.

WHETHER THE COURT SHOULD ORDER JOINDER

The defendant advanced the argument that, as both Zimnat and Altfin may have an interest or assist in the resolution of the dispute between the parties since the insurance risk can only be assumed by an insurer, and not the defendant, which was merely an agent, it was appropriate, in the interests of justice, to join them to the suit. In support, defendant cited r 87 (2) (b) of the High Court Rules and the case of *Least Supplies (Pvt) Ltd t/a L.S. Cellular & L.S Capital* v *T.I.B. Insurance Brokers and Heritage Insurance Company HB* 9/15. The defendant further advanced that, even if it had not sought joinder, r 87(2) allowed the Court to order joinder *mero motu.* The Court was also referred to *Nyamweda* v *Georgias* 1988 (2) ZLR 422(S).

The plaintiff, on the other hand, argued that in terms of r 87(1) non-joinder is not fatal. In support, it cited *Rodger & Ors* v *Muller & Ors* HH-2-10. Further, the plaintiff submitted that, in line with the decision in *Mugano* v *Fintrac & Ors* HH 394-13, the right to demand joinder and the duty of the court to so order, are limited to cases of joint owners, joint contractors, joint partners and where the party sought to be joined has a direct and substantial interest in the issues involved where the interest is a right which is the subject matter of the litigation. The plaintiff avers that its claim solely relates to the conduct of the defendant and how such conduct caused it loss.

It is true that the legal position is that r 87(2) allows the Court to, *mero motu,* join a party to a suit. However, r 87(1) unequivocally states that

> "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter".

The ordinary interpretation of the rule does not, in my view, make non-joinder fatal. More particularly, joinder or non-joinder of a party does not defeat a valid action or cause. It seems to me, therefore, that what is important in determining whether joinder is necessary is whether the court is still able to determine the questions or issues in dispute in so far as they affect the rights of the parties before it.

In the present case, the Court is required to determine whether or not the conduct of the defendant was a breach of its legal duties which caused the plaintiff to suffer consequential losses as averred in para 2.4 and 2.5 of the declaration. For such a determination to be made, it is not necessary, in my opinion, to join Zimnat or Altfin as the defendant is sought to be held accountable for its own conduct. No substantial interest of Zimnat or Altfin is thus revealed in defendant's conduct as the claim is not based on a breach of the insurance contract. At best, Zimnat and Altfin could provide witness whether the conduct of the defendant was the cause of the failure of the risk cover. Therefore joinder would not take the matter further.

Consequently the exception based on non-joinder must fail.

WHETHER THE COURT HAS NO JURISDICTION AS THE MATTER OUGHT TO HAVE GONE FOR ARBITRATION

The defendant argued that the court had no jurisdiction as the matter ought to have been referred to arbitration first. It premised this argument on the fact that "there was an undoubted exchange of documents, though unsigned, and letters between the parties in which an arbitration clause was clearly spelt out."

The defendant averred that such communication and exchange of documents satisfied the requirements of Art 7(2) of the Model Law contained in the schedule to the Arbitration Act [*Chapter 7:15*] in that an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement.

Consequently, the defendant submitted that, consistent with *Capital Alliance (Pvt) Ltd* v *Renaissance Merchant Bank Ltd & Ors* 2006 (2) ZLR 232 (H) at 239 the matter ought to be referred to arbitration**.**

For its part, the plaintiff argued that since the draft contract was never signed, it is irregular and unsustainable at law to claim recourse to arbitration thereunder, as it is not a binding and valid contract until it is signed. For this assertion, it relied on *Makeh Enterprises* v *Kaiser (estate) and Another* HB 136-03.

Article 8 (1) of the Model Law contained in the Arbitration Act [*Chapter 7:15*] requires a court, where a dispute is subject to an arbitration clause, to stay proceedings and refer the matter to arbitration where a party so requests not later than when submitting his first

statement on the substance of the dispute as long as the arbitration agreement is not null and void, inoperative or incapable of being performed.

The defendant having raised this issue in its plea, which was its first statement on the dispute, the court would have no option but to stay proceedings and refer the matter to arbitration in the event that a valid arbitral clause which is operative or capable of being performed exists. (See the interpretation of Art 8(1) by Smith J in *Waste Management Services* v *City of Harare* 2000 (1) ZLR 172 (HC) which was quoted with approval by Makarau JP (as she then was), in *Shell Zimbabwe (Pvt) Ltd* v *ZIMSA (Pvt) Ltd*, HH 84-2007 at 2-3.

It is therefore necessary to determine whether an arbitration clause in an unsigned contract between the parties is valid. The plaintiff, citing the authority of *Makeh supra* avers that it is not, because <u>there is no signed binding contract</u> (my emphasis). On the other hand defendant argued that that case is distinguishable, firstly, because it is contrary to the interpretation of Art 7 (2) of the Model Law that has been rendered internationally to meet the writing requirements, and, secondly, that, in that case, there was clearly no meeting of the minds between the parties.

It seems to me that in the present case, it is necessary to find whether or not a signed binding contract is required to satisfy the requirements of the Arbitration Act.

In interpreting the Act, and the Model Law therein, reference must be had to the provisions of s 2 (2) of the Arbitration Act, which requires, in its interpretation and application, regard to be had to the international origins of the model law and the desirability of achieving uniformity. For that reason, the commentary in the *Arbitration Sourcebook* is relevant, and so is the interpretation rendered in other jurisdictions, save where they are distinguishable.

Article 7 (2) of the Model Law provides as follows:

> "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or 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 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 confirms an arbitration agreement provided that the agreement is in writing and the reference is such as to make the clause part of the contract".

The commentary in the *Arbitration Sourcebook*, at p 5-12 observed, correctly, in my view, that the writing requirement provided under Article 7(2) can be met in one of four ways which I restate as follows:

1) agreement in a document signed by the parties
2) exchange of letters, telex, telegrams or other means of communication which provide a record of agreement
3) exchange of statements of claim and defence alleging the existence of an agreement which is not denied by the other party; and, fourthly
4) Reference in a contract to a document containing an arbitration agreement so long as the agreement is in writing and the reference makes it a part of the contract.

Consequently, I am of the firm view that the correct position is that Art 7(2) recognises that an arbitration clause may be presumed to exist in the absence of a written and signed arbitral clause where an undoubted exchange of letters, faxes documents or other communication provides a record of an agreement to arbitrate.

It is clear that in the present case, there is no signed and binding agreement to arbitrate. However, it is also quite evident that there was an exchange of letters and communication in which the arbitration clause was spelt out, *viz*:

1. Paragraph 11 of the contract hand-notated as 2nd Draft 2/2/11 contained at p151-7 of the plaintiff's bundle; and
2. Paragraph 10 of the contract date stamped 15 February 2011 contained at p 128-133 of the defendant's bundle.
3. The letter from the plaintiff to defendant dated 15 February 2011, contained at p134 of the defendant's bundle, forwarding the draft contract at para 2 above and requesting to be advised if it was in order to allow printing of the final version for signature; and
4. The letter from the defendant to plaintiff dated 23 February 2011, contained at p 135 of the defendant's bundle, confirming the defendant's happiness with the draft and requesting the final version to be submitted for signature.

It seems to me that this litany of exchanges, which were not disputed, satisfy the requirements of Art 7 (2). I am therefore not persuaded by the plaintiff's argument that since the agreement was not signed and binding, predicating arbitration on it is "irregular and unsustainable at law", because this flies directly in the face of the clear provision of Art 7 (2) which provides three other scenarios, (other than agreement in a signed document), for the

validity of arbitration agreements. Accepting the plaintiff's argument would result in a restrictive interpretation of Art 7 (2) which would have the effect of rendering redundant a significant portion of the provision.

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. That the agreement should be signed and binding is only one among four scenarios, which are clearly stand-alone, on which the validity of an arbitration agreement can be ascribed. Consequently, I am of the view that a signed binding contract is not required to satisfy the requirements of the Arbitration Act.

I agree with the pronouncement in the *Makeh* case that, generally, an unsigned draft contract is not valid. However, that truism is turned on its head by the peculiar situation envisaged in Art 7 (2) of the Model Law, which recognises that an arbitration agreement may exist in the absence of a signed and binding agreement.

Nor am I persuaded by the assertion by the plaintiff that the draft contract is at best an offer which can be rejected or accepted. *In casu*, because of the peculiar provisions in the Model Law, the offer to arbitrate was made and accepted (see p 134-135 of the defendant's bundle) thus creating an agreement. The *Makeh* case is clearly different because there, suggestions for modification, and suspensive conditions were put before the draft could be signed. I therefore agree with defendant that the *Makeh* case is distinguishable and not applicable to the present case.

I conclude that this is a case which is on all fours with CLOUT Case 44, where, in the absence of a written and signed arbitral agreement, the Hong Kong High Court relied on material addressed by one party to the other in reaching its conclusion that the parties had agreed on arbitration. (See *Arbitration Sourcebook* 5-12).

I therefore find that an agreement to arbitrate in accordance with Art 7 (2) was reached. Consequently, the jurisdiction of the Court is ousted and this matter ought to be stayed and referred to arbitration in accordance with Article 8.

Having found that this is a matter which ought, properly, to be referred to arbitration I would ordinarily have stopped there. However, assuming that I am wrong in that finding, and, in order to dispose of all the preliminary issues, I will also consider whether the summons is fatally defective, and discloses no cause of action against defendant.

WHETHER THE SUMMONS IS FATALLY DEFECTIVE

The defendant also took issue with plaintiff's summons, arguing that it was so defective that it was incapable of amendment as it fell afoul of r 11(c). It was defendant's further contention that the declaration did not save the summons as it was a "rambling account" which did not pithily articulate the case to be met by defendant, in particular the origins of the principal/agent relationship and the alleged breaches thereof.

For its part, the plaintiff argued that its summons and declaration merely suffered from inelegant drafting which could be cured by an amendment as decided in *Matewa* v *ZETDC* HH-304-13. Alternatively, evidence could be led during trial to disclose a cause of action as posited in *Mnangagwa* v *Alpha Media Holdings (Pvt) Ltd & Anor* HH-225-13. The plaintiff further submitted that, in any event, the summons and declaration adequately appraised the defendant of the case it had to answer, that is why it managed to plead. The plaintiff was of the further view that defendant, having pleaded to a "defective" summons and declaration, could no longer rely on such defect to impugn the summons as ruled in *Ndlovu* v *Debshan (Pvt) Ltd & Anor* HH-362-12. The plaintiff therefore urged the Court to disregard technical formalism to impugn its cause, per the decision of Winsen AJA (as he then was) in *Federated Trust Ltd* v *Botha* 1978 (3) SA 645 A at 654.

Rule 11(c) requires the summons to contain:

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

The interpretation of Rule 11(c) has long been settled in various case law. I can do no better than quote Makarau JP (as she then was) in *Chifamba* v *Mutasa and Ors* HH 16/08 wherein she stated:

> "the purpose of pleadings is not only to inform the other party in concise terms of the precise nature of the claim they have to meet but pleadings also serve to identify the branch of law under which the claim has been brought. Different branches of the law require different matters to be specifically pleaded in the claim to be sustainable under that action".

Plaintiff's summons reads as follows:

> "The Plaintiffs claim against the Defendant is for:
> (a) Payment of the sum of USD$458 176-00;
> (b) Interest thereon calculated on the prescribed legal rate from the date of issue of summons to the date of payment in full; and
> (c) Costs of suit."

There can be no doubt that the summons is defective, merely stating as it does the relief sought, without any indication at all of the precise nature, extent or legal basis for the claim, however briefly. The question therefore is whether the declaration saves it.

In para 2.1. of the declaration, the plaintiff claims that it entered into a brokerage agreement which prescribed defendant's obligations and duties as outlined in para 2.2. In para 2.4. the plaintiff alleges that defendant breached these duties making it liable for consequential losses which are specified in paragraph 2.5. In para(s) 2.6. and 2.7. the plaintiff alleges that it made demand for USD$458 176-00 which the defendant failed/neglected or refused to pay.

I echo the sentiments of Mwayera J in *Hwange Colliery Gasification Company* v *Hwange Colliery Company Limited HH-477-15* at p 2 as aptly stating the legal position, when she said:

> "It is settled by definition that pleadings should be concise and to the point. The pleadings must inform the parties of the points and issues between to enable each to know in advance what case they are faced with. By nature long winding and argumentative pleadings are not only failing to comply with the rules of the court but defeat the whole purpose of pleadings. Pleadings must be clear and to the point. They need only identify the branch of the law under which the claim or defence to it is made and should not contain evidence."

Judged on the above quote, the plaintiff's declaration may, at best, be termed an inelegantly drafted document. At worst, to borrow from the defendant's expression, the declaration is a rambling account which does not pithily set out the origins of the principal/agent relationship, and the obligations and duties arising therefrom.

However, it seems to me that, while the declaration runs afoul of the requirement to be concise, it does set out the plaintiff's cause: that

a. the parties entered into a brokerage agreement which defined defendants duties and obligations,
b. the defendant breached those duties causing plaintiff to suffer consequential losses
c. the plaintiff seeks to be recompensed for those losses.

The difficulty that the plaintiff faces is that factually, there was no written and signed agreement between the parties, as required by the conditions of the tender, on which the parties' relationship could be based. This, in my view, nullifies the assertion that "the parties entered into a brokerage agreement which defined defendant's duties and obligations".

In fact, the plaintiff itself relied on this to argue that there was no agreement to arbitrate. To overcome this challenge, in its oral submission, the plaintiff claimed that the brokerage agreement was contained in the documents for the tender which defendant won.

It is trite that the plaintiff cannot approbate and reprobate. Either there was an agreement, in which all consequential duties and obligations for both parties were circumscribed, including brokerage responsibilities as well as arbitral arrangements, or there was none. If there was no agreement to arbitrate because there was no written and signed agreement between the parties, there equally could not exist any agreement with duties and obligations on which legal basis defendant can be held accountable.

In fact, the tender required the parties to enter into a binding brokerage contract of which the tender documents would be part. See pp 102 and 111 of the plaintiff's bundle. It seems to me that this was a clear recognition, firstly, that the tender documents were not a contract between the parties, and secondly that a written and signed contract was a pre-requisite for the relationship between the plaintiff and the defendant to create any duties and obligations.

Taken further, the law of contract under which the plaintiff's cause is claimed to be founded becomes untenable and leaves the plaintiff with no legal basis for its claim.

While it is true that in certain circumstances a defective summons can be cured by an appropriate amendment, I note that these are challenges that go to the very foundation of the plaintiff's claim which cannot be cured by any amendment.

In my view, that the summons and declaration are defective is a question of law which can be raised at any time. See *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153(SC). I am not convinced that the fact that the defendant pleaded to defective summons closes the door against it raising the issue at trial. I say so because the defendant did raise the issue by notice before it pleaded. Subsequently, it restated its complaint about the defects in the summons in its plea. I believe that the case of *Debshan (supra)*, is distinguishable. In that case no complaint was raised at all with regards to the defects in the summons and declaration until the trial date.

Nor am I convinced by the argument that evidence should be allowed to be led to cure the defect in the summons and declaration. I believe that the case of *Mnangagwa (supra)* has been incorrectly cited as authority for this assertion, given the circumstances of this case. In that case, the summons disclosed a cause of action, *viz*; damages for defamation in the amount of USD$1 million; and so did the declaration. The question at issue was whether on

the face of it, a reasonable person of normal intelligence and with knowledge of the circumstances could or might regard the statement as defamatory. Evidence would then be required to be led to determine whether a reasonable person would regard the statement as defamatory.

While I agree that technical application of the rules should be avoided to ensure substantive resolution of disputes, I am also of the view that rules are meant to be followed to guide proper dispensation of justice and speedy resolution of matters. To allow parties to willy nilly flout the rules would lead to chaotic administration of justice. A balance must be struck between adherence to the rules and effective resolution of matters. And where legal practitioners are, in the exercise of their expertise, responsible for drafting processes, then a higher standard of compliance with the rules should be expected.

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.

WHETHER, THE SUMMONS AND DECLARATION DISCLOSE A CAUSE OF ACTION AGAINST THE DEFENDANT, A BROKER

A summary of the defendant's submissions on this score is that, as a broker, it had the role of facilitating agreement between the plaintiff and an insurer to assume the insurance risk put to tender. And at the end of the day, the insurer and the plaintiff had to be *ad idem* in order to enter into the second contract envisaged in the proforma to the tender documents (See p 114 of the plaintiff's bundle). Without such agreement, defendant argued that, as an agent, there could therefore be no cause of action against it, as at law it is the insurer and insured who contract with each other to secure a risk.

On the other hand, the plaintiff's argument suggests that defendant ought to have found an insurer who would meet its risk on its terms as outlined in the tender documents. Failure to do so amounted to a breach of its duty which made it liable to indemnify the plaintiff for the insurance exposure.

A succession of cases culminating in *Dube* v *Bahana 1998 (2) ZLR 92 (H)* have quoted with approval, *Read* v *Brown* (1888) 22QB 131 where Lord Esther MRs stated that a cause of action is

> "every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court".

Consequently, Lord Fry stated the opposite of that in the same case at p132-133 when he said that a cause of action is

"everything which if not proved gives the defendant an immediate right to judgment".

Therefore a cause of action is a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person (See *Letang* v *Cooper* [1965] 1QB 232 at 2422-3).

Firstly, it is trite that an insurance broker does not provide insurance cover as it is not an insurer.

Secondly, in the instant case, in order to succeed in its claim, the plaintiff ought to prove the fact that either Zimnat, Altfin or indeed any other insurer, was willing to cover its risk on its terms. This fact ought therefore to have been disclosed however briefly in the summons and declaration, in addition to the averment that defendant breached its duty in failing to facilitate such cover. Failure to do so, in my view, renders the summons and declaration fatally defective as disclosing no cause of action.

The factual situation is that defendant presented to Zimnat the insurance package required by the plaintiff in terms of the tender. Zimnat was willing to assume the risk, but it made a counter offer wherein plaintiff had to pay more in premium rates to maintain the level of cover that the plaintiff required. The plaintiff insisted that it would only pay the rates in terms of the tender documents. Zimnat and the plaintiff were therefore never *ad idem*. No contract was therefore concluded between the plaintiff and Zimnat as required by the tender. The latter consequently declined to cover the risk.

The defendant took the plaintiff's requirements to Altfin, which was also ready to cover the plaintiff's risk. However, Altfin required increased premium rates or a reduction in benefits in order to assume the risk. The plaintiff refused to compromise. Therefore, there was also no agreement between the plaintiff and Altfin, which withdrew from the process.

I do not think that the fact that the defendant wrote to the plaintiff advising that it had placed cover with Zimnat or Altfin, negated the requirement for the plaintiff to enter into a contract of insurance with the insurers. That is probably why, at all stages, defendant advised

the plaintiff of the insurers' requirements to enable the conclusion of an insurance contract. The case of *Lenarerts* v *JSN Motors (Pty) and Another* 2001 (4) SA 1100 (W) is therefore not apposite.

Further, I am unable to agree with the plaintiff's position for the reason that an insurance broker is a facilitator, and not an insurer. It is trite that a broker cannot force an insurer to cover a risk. It can only advise an insured on how it can properly secure its risk and facilitates negotiations with an insurer for an appropriate package for the insured, following which an insurance contract would be entered into between the insurer and insured. The case of *Least Supplies (Pvt) Ltd* v *TIB Insurance Brokers & Anor* HB-009-15 is therefore distinguishable, as the defendant did not fail to obtain a policy in accordance with the plaintiff's instructions, but that the plaintiff was unwilling to pay the commensurate rates required for an insurance policy contract to be entered into.

I note in particular that the tender documents envisaged that there could be variations on the insurance rates (See para 6.5 at p 111 of the plaintiff's bundle). I therefore believe that the plaintiff was the author of its own doom in adopting an unbending attitude to the negotiations for insurance cover.

Since no insurer was willing to assume the risk on the plaintiff's terms, and the plaintiff was unwilling to compromise, I have difficulty in finding that defendant breached its duty in the circumstances. In that regard, I do not find the cases cited at para 11 of the plaintiff's heads of argument helpful, as they relate to a situation where a broker failed to perform its duties where an insurance contract existed.

In the circumstances of this case, where the plaintiff itself made it impossible for the defendant to facilitate such cover by insisting on terms which insurers were not willing to agree to, I find it difficult to discern the plaintiff's cause of action against the defendant. The deficiency in the plaintiff's basis of a claim against the defendant is, in my view, so fundamental that it cannot be cured by amending the summons and declaration.

In passing, perhaps if the contract of brokerage agency, had been entered into between the plaintiff and the defendant as peremptorily required in terms of the tender (see para 6.4, p 111 of the plaintiff's bundle), its terms would have provided for recourse where the defendant failed to find an insurer willing to assume the risk as demanded by the plaintiff, thus creating the duty of care to found the plaintiff's cause of action.

Having primarily found that this matter ought to have proceeded by way of arbitration, and that the plaintiff has been unsuccessful in three of the four preliminary issues raised, it is just and equitable that the plaintiff bears the defendant's costs.

DISPOSITION

In the event, it is held that:

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

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Gill, Godlonton & Gerrans, defendant's legal practitioners