DAVID JAMES SMITH
versus
FALCON COLLEGE TRUST T/A QUEST AFRICA

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 07 July 2017 & 14 December 2017

Opposed Matter

T. Zhuwarara, for the plaintiff
T. Mpofu, for the defendant

CHIWESHE JP: The plaintiff issued summons against the defendant claiming the sum of US$90 700-00 for damages for bodily injuries, suffered by the plaintiff while taking part in a bridging life skills and coaching programme offered and administered by the defendant. The injuries were sustained on 10 February 2014 at Lower Ncema Dam, Bulawayo. The plaintiff further claimed interest on the above sum calculated at the prescribed rate plus costs of suit.

The defendant entered appearance to defence on 20 February 2017 and subsequently filed a special plea in terms of which it pleaded as follows:

> "Defendant pleads to plaintiff's summons and declaration as being bad in law for the following reasons:
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> 1. Plaintiff's action is a claim for damages for injuries sustained by him during a course conducted by defendant on or about the 10th February 2014.
>
> 2. The claim is founded on the alleged negligence of defendant's instructor, Mr Brayan, at the material time.
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> 3. Plaintiff confirms that on the 14th of October 2013, at Harare, he signed a contract with defendant for that particular course and has attached the agreement to his further particulars of claim.
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> 4. Plaintiff has further confirmed and acknowledged that:
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> 4.1. The agreement has an indemnity clause in favour of defendant.
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> 4.2. In that indemnity clause:

a) Plaintiff and his guardian acknowledged that some modules and activities of the course, involved an element of risk and that participation would be at plaintiff's own risk
.

b) Plaintiff and his guardian indemnified defendant, amongst other people, against any claims for personal injuries, death or accidents which could occur during such course or activities.

5. In addition to the above, on the 20th January 2014, plaintiff signed a further indemnity, restating the above and in particular:

5.1 Plaintiff acknowledged that there is an element of risk in some of the modules and activities which form part of the program.

5.2 Plaintiff indemnified defendant and its employees etc, against any claims for personal injuries or accidents which might occur during the program.

5.3. Plaintiff agreed that he would have no right of action against the defendant and its employees etc, for any injuries suffered by him through the fault or negligence of such employees or officers.

5.4. Plaintiff further acknowledged that he would participate in the activities at own risk without liability whatsoever to defendant and its employees etc.
Attached and marked Annexure "AA" is the letter of indemnity.

6. Accordingly:

6.1 Plaintiff, specifically contracted not to sue defendant or its employees/instructors on the basis of negligence and specifically agreed to participate in the course/program/activities without any liability whatsoever to the defendant, its employees/instructors.

6.2. Having signed the indemnity aforesaid, plaintiff has no cause of action against defendant, its employees or instructors and is barred/estopped from suing defendant for his personal injuries.

6.3 By virtue of the said indemnities therefore, defendant and its employees/instructor thereby contracted themselves out of negligence and cannot be sued by plaintiff on the basis of the same.

7. In any event and in addition to the above:

7.1 In the said main Agreement signed by the parties, Plaintiff contracted to obey all reasonable instructions from staff, facilitators, instructors and team leader's (Clause 4.3)

7.2 By complying with the instruction of Mr Bryan, Plaintiff thereby acknowledged that the instruction was reasonable. Plaintiff cannot therefore sue Defendant for that instruction, without more, which he could have disobeyed if he thought, at the time, it was unreasonable.

7.3 Plaintiff thus participated in the particular activity, at his own risk and has no cause of action against the Defendant."

On 30 March 2017 the defendant's legal practitioners wrote to the plaintiff's legal practitioners as follows:

> "Dear Sirs
>
> DAVID JAMES SMITH vs FALCON COLLEGE TRUST CASE NO. HC 806/17
>
> We refer to above matter.
>
> You have received separately to this letter, our Special Plea. That Special Plea is self-explanatory. In fact, you will have noted that your client specifically signed a Contract, indemnifying Falcon College and assenting to their contracting out of negligence. He therefore, cannot sue Falcon College on the basis of negligence as doing so will turn the Law of Contract on its head, so to speak. It occurs to us that you may not have been instructed and furnished with the relevant documents particularly Annexure "AA", attached to our Special Plea. We suspect, that had you been furnished with that document, you would not have instituted the above suit as your client has no cause of action against ours.
>
> In view of this, we invite you to file a Notice of Withdrawal with a tender for costs, by close of business of the 5th of April 2017, failing which, we shall file our Heads of Argument in this matter and ask that your client's case be dismissed with costs on the attorney and client scale. We hope this will not be necessary."

In his heads of argument the plaintiff raises a valid point *in limine*, namely that a special plea is one that raises an objection that does not relate to the merits of the matter. That is trite. In support of that submission the plaintiff relies on a number of authorities. Herbstein and Van Winsen in *The Civil Practice of the High Courts of South Africa*, 5th ed at p 598 correctly state as follows:

> "As stated, a special plea is one that does not raise a defence on the merits of the case, but as the name implies, sets up some special defence which has as its object either to delay the proceedings (a dilatory plea) or to object to the jurisdiction of the court (a declinatory plea) …."

The defence of indemnity raised by the defendant cannot be a special plea in that it is a plea that relates to the merits of the matter. It is neither a dilatory or declinatory plea. In essence the defendant's contention is to the effect that it is not liable on the merits because it is exempted from liability in terms of a contract of indemnification. The defence proffered amounts to an ordinary plea.

Rule 137 of the High Court Rules, 1971 provides alternatives to pleading to the merits. Rule 137 (1) is particularly relevant to the present matter. Its provisions confirm the position set out above, namely that a special plea or plea in bar is one that does not relate to the merits. It provides that:

"(1) A party may –

(a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case."

See also *NEC Construction Industry* v *ZW Nantong International* SC 59/15, *General Leasing (Pvt) Ltd* v *Allied Timbers Zimbabwe* HH 76/15.

Apart from raising the defence of indemnity the defendant also avers that the parties contracted "out of negligence", or put differently, the parties are bound by the clause in their contract exempting liability for negligence.

These defences and exemptions may well be founded. That however does not raise them to the status of a special plea. This is so because to sustain them one must examine the contract document itself. That examination by its very nature involves the assessment of documentary evidence. It was for that reason that the defendant was unable to specially plead without attaching, as it did, the contract document. No evidence should be attached to any pleading as the defendant has sought to do by attaching that document to its plea.

It is clear from the above that the defendant should not have taken a special plea because the defence it proffers does not constitute a special plea. Accordingly, the point *in limine* must be upheld. The special plea cannot succeed.

Both parties addressed the court on the merits. For purposes of this application it is irrelevant to consider the merits of the matter. I do not intend to do so for such will be the subject of debate before another court sitting to determine the merits of the case. I am concerned only with the fate of the special plea.

It is ordered as follows:

1. The special plea be and is hereby struck off with costs.
2. The defendant be and is hereby directed to file its plea within fourteen days from the date of this order.

Atherstone & Cook, plaintiff's legal practitioners
Coghlan & Welsh, defendant's legal practitioners