

AMBASSADOR AGRIPA MUTAMBARA  
and  
ESTHER MUTAMBARA  
versus  
CONSTANTINE CHIMAKURE  
(EDITOR OF NEWSDAY NEWSPAPER)  
and  
ALPHA MEDIA HOLDNGS (PVT) LTD

HIGH COURT OF ZIIMBABWE  
MATANDA-MOYO J  
HARARE, 29 April 2015 and 17 June 2015

### **Unopposed Matter**

Ms *Maphosa*, for the plaintiffs

MATANDA-MOYO J: This matter was set down before me on the unopposed roll. Upon perusing the file I noted that the issue of set down on the unopposed roll was hotly contested by the defendants. Correspondence between the parties shows that the defendants are claiming that they set the matter down in terms of the rules and in particular Practice Directive 1/13. In their correspondence it is clear that it is not certain whether indeed the defendants set the matter down as per the rules as read with the Practice Directive. It is not my function to go into that enquiry and that enquiry can properly be carried out in the presence of both parties.

In the interest of time, I stood down the matter to my chambers and called the lawyers for the defendants to ascertain whether indeed the matter was set down. Mr *Mahlangu* for the defendants produced an unissued notice of set down dated 25 July 2014 which notice of set down was only served on the plaintiffs on 22 October 2014. The Registrar sent such notice to the Sheriff on 21 October 2014.

Mr *Mahlangu* argued that r 138 of this court's rules could no longer be complied with as the function of setting down of matters is now vested in the Registrar. The parties could no longer set the matters down and once a party request a set down date from the Registrar, such party would have complied with the rules.

Rule 138 (a) of the High Court Rules enjoins a party who files a special plea, exception or application to strike out to set the matter down with the consent of the other party within ten days of filing of such special plea, exception or application to strike out in accordance with r 223 (2).

Rule 223 (2) provides;

- “2. Subject to subrules (3), (4) and (5) and to rule 238, exceptions, applications to strike out and other applications which are opposed shall be set down for hearing – (a) in Harare, on a business day agreed with the registrar, by filing a notice of set-down with the registrar not less than six business days before the day of set-down.”

The brief chronology of events is as follows;

On 19 May 2014 the applicants issued summons against the defendants for defamation damages in the sum of \$200 000-00. On 3 June 2014 the defendants entered an appearance to defend. On 3 July 2014 the plaintiffs filed and served upon the defendants a notice to plead and intention to bar. On 10 July 2014 the defendants filed an exception and application to strike out. On 18 July 2014 defendants filed heads of argument in respect of the exception and application to strike out. On 4 September 2014 plaintiffs filed their heads of argument. On 20 October 2014 the defendants filed a notice of set down on the opposed roll. On 24 October 2014 the plaintiffs filed another Notice to plead and intention to bar which notice was served on respondents on 27 October 2014. On 3 November 2014 the respondents filed a plea in abatement.

The plaintiffs took the attitude that there is no plea filed, and that, respondents are barred for want of filing a plea. The plaintiffs prayed for default judgment in terms of the rules.

When the plaintiffs filed a notice to plead on 24 October 2014 the defendants had four days prior to that sought set down date with the Registrar. When such notice to plead was filed the court was not made aware that the exception and application to strike out was awaiting a date from the Registrar. The question is whether it was competent to file a notice to plead when the exception and application to strike out had been set down? The answer is no. The plaintiffs could only seek their remedy before the opposed roll rather than on their own without a court's determination or finding that the set down was a nullity. In *Swazi M.T.N Limited v MV Tel Communications (Pty) Ltd and Others* Swaziland High Court 7/06 stay of execution was granted pending determination of rescission of judgment where the defendant had filed an appearance to defend after the time prescribed by the rules. No condonation for late filing of such notice had been granted, the judge found that the

negligence or lack of diligence by the defendant's lawyer may not be good enough to be equated to wilful default on the part of the defendant.

In the matter in *casu* when the plaintiffs sought set down on the unopposed roll, they were aware that the respondents had applied for set down date. It is for a court to find that such request for set down was out of time and of no consequence. It is a court or judge who should order that the matter be referred for determination on the unopposed roll. It is not the duty of the judge sitting in motion court to make determination whether the set down request is valid or not.

It is common cause that after the request for set down was filed with court on 20 October 2014, the plaintiffs issued another Notice to Plead and Intention to Bar on 24 October 2014. The defendants filed a plea in abatement, in response to the notice to bar. A plea in abatement is a special plea which does not absolutely defeat the plaintiff's claim and does not deal with the merits of the case. It is a dilatory plea. The defendants insist that plaintiff's claim does not disclose a cause of action and cannot be pleaded to. The defendants also pleaded that the second notice to plead issued is irregular and must be struck off.

I am of the view that the above issues ought to be dealt with on the opposed roll. If the judge sitting finds that there is no opposition, the relief sought could still be granted thereat. A judge sitting on the unopposed roll has limited time to be expected to deal with issues raised by both parties. Once it becomes necessary to look at two sides of a case, it follows that the matter is opposed.

Accordingly the matter is removed from the roll of unopposed matters and redirected to the roll of opposed matters.

*Sawyer & Mukushi*, plaintiff's legal practitioners