

GENERAL LEASING (PVT) LTD
versus
ALLIED TIMBERS ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 January 2015 and 4 February 2015

Special Plea

Ms W.L. Chirongoma, for the plaintiff
N.M. Phiri, for the defendant

MATHONSI J: The plaintiff instituted summons actions against the defendant on 25 February 2014 for payment of a sum of \$30 696-00 together with interest at the prescribed rate from 31 December of an unnamed year to date of payment and punitive costs, for services alleged rendered from 31 December 2008 to March 2013. It averred that it leased to the defendant PABX systems and Telephones at Chinhokwe site.

In response to the summons the defendant filed a special plea in the following:-

“Defendant hereby files its special plea as follows:-

1. Prescription

Plaintiff’s claim has prescribed. Plaintiff’s claim arose in 2008 and it has since prescribed.

2. Cause of action

- (i) There is no contract between plaintiff and defendant. Defendant does not know plaintiff as plaintiff entered into a contract with Forestry Commission of Zimbabwe.
- (ii) There is no basis for the claim in Unites States dollars yet the contract is in Zimbabwean dollars. Further there was never a contract signed in United States dollars between the parties.”

At the hearing of the matter, I raised the issue of failure to comply with the rules of court relating to such matters as there appeared to be a serious disregard of those rules in setting down the matter. Mr *Phiri* who appeared for the defendant skirted around the issue. He submitted that, whereas the rules require that such a matter be set down within a specified period of time, it can only be set down when heads of argument have been filed. For that reason the practice makes it impossible for the matter to be set down within the time prescribed by the rules. To him the issue is as simple as that and for that reason parties should be allowed to request a set down as they please and they should be given audience.

Ordinarily one would overlook that kind of aberration but the infringement of rules providing for exceptions and special pleas has become too frequent that one begins to doubt if litigants ever bother to consider those provisions in the rules. There is therefore, a need to redirect the attention of litigants to the requirements of the rules relating to exceptions and special pleas.

In terms of r 137(1) of the High Court of Zimbabwe Rules, 1971, a party may take a plea in bar or abatement where the matter is one of substance which does not involve going into the merits, except to the pleading, apply to strike out or apply for further particulars. When such plea in bar or exception has been made there are peremptory provisions for set down. In terms of r 138:

- “Where a special plea, exception or application to strike out has been filed –
- (a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223;
 - (b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;
 - (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 date.”

Clearly these are peremptory provisions that have to be complied with. A litigant cannot be allowed to ignore the procedure spelt out in the rules because this is not any other day in office where they would otherwise do as they please. The procedure itself is disarmingly straight forward and is there for a purpose. The bigger picture is that the process

of pleading specially, excepting or applying to strike out should not be unrolled as a vehicle for delaying proceedings. It is meant for genuine and serious litigants desiring to bring finality or at least to obtain genuine relief where shoddy pleading has occurred.

What is happening presently at this court is that the procedure is frequently being summoned by defendants, or is it legal practitioners, who find themselves cornered to file a plea and are unable to do so either because they are not ready, the legal practitioner not having taken full instructions but finding nothing ethically wrong with entering appearance to defend, or, having taken instructions, is very much aware of the shaky defence the defendant has or the none existence of it. The procedure is then abused for dilatory purposes.

The time frames set out in the rules have to be followed every step of the way in order to put the special plea, exception or application which is not meritable out of the way and get on with the business of completing pleadings. Where it has merit, the first prize is won.

Therefore, where the other party has not consented to the special plea, exception or application to strike out within 10 days of their filing the matter has to be set down for hearing within a further period of 4 days. With the procedure for set down currently in place at this court where litigants are required to submit an application for set down to the registrar before the matter is allocated a judge who would then give it a set down date, all the litigant is required to do to satisfy the provisions of that rule, is to file heads of argument in readiness and submit an application for set down. This has to be done within the four day period following the failure to consent.

In the event that the party pleading specially has not secured the consent of the other party to the special plea, exception or application and has not made an application to the registrar of this court for a set down, that party loses the opportunity to have the special plea, exception or application to strike out determined at that early stage of the filing of pleadings. As they say time waits for no one. In that event, the party has to plead over to the merits and the special plea, exception or application shall only be determined at the trial.

I am aware that r 223 provides for the set down of opposed exceptions and applications to strike out in Harare on a business day agreed with the registrar not less than 6 business days before the day of set down. This only simplifies the procedure to the extent that even before the practice of having matters set down by the presiding judges, there was always a need for the date of set down to be agreed with the registrar of the court to avoid a set down date which would have no takers.

In my view the requirement for the filing of heads of arguments where the applicant or excipient is to be represented by a legal practitioner does not impugn the procedure for set down I have alluded to as, in terms of r 238 (1) (a), the heads of argument should be filed before the matter is set down. I do not agree with Mr *Phiri* for the defendant that the practice of filing heads of argument makes it impossible for one to comply with the time frames set out in the rules. It boils down to the simple point that you should not file a special plea, exception or application to strike out when you are not ready to argue it. Prepare it together with the heads of argument for filing.

In this case the defendant filed the plea on 14 August 2014. There was no consent to it. Instead the plaintiff replicated to it on 25 August 2014 without the defendant having applied for a set down date. In fact the defendant's legal practitioner only filed heads of argument on 4 September 2014, 10 days shy of a month after the special plea was filed and paid for the service of the notice of set down on 18 September 2014. This, the defendant could not do.

The rules specifically prohibit the set down of a special plea in that manner. It cannot be set down before trial. The same point was stated in *Mazibuko & Anor v Ndebele & Ors* 2008 (2) ZLR 26 (H) 29B that:-

“The applicants did not plead over to the merits when it is mandatory that they should do so. As if that was not bad enough, the applicants went on to set down the matter for argument before trial. The rules prohibit that. On that basis also, the Applicants are not properly before this court.”

I would therefore not countenance entertaining the special plea which has been set down for hearing in violation of the rules. The matter is improperly before me.

Accordingly, IT IS ORDERED THAT:-

1. The defendant's special plea is hereby stood down for determination at the trial.
2. The defendant is directed to plead over to the merits of the claim within 10 days of this order.
3. The costs shall be in the main cause.

C. Kuhuni Attorneys, Plaintiff's Legal Practitioners
Muvingi and Mugadza, Defendant's Legal Practitioners