

GREAT INSIGHT INVESTMENTS (PVT) LTD
and
NYLAND ENTERPRISES (PVT) LTD
versus
CHEMIST SIZIBA
and
DWELLWORTH MARKETING (PVT) LTD
and
MAVISTA INVESTMENTS (PVT) LTD
and
CHIEF REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 14 January 2016

Opposed Application

F Girachi, for the plaintiff
Z Chadambuka, for the first defendant
A Chambatifi for the second defendant
T Machiridza, for the third defendant

FOROMA J: This is an opposed matter wherein plaintiffs raised an exception and took a plea in bar to the first defendant's claim in reconnection. The plea in bar and exception were filed on 20 May 2014 together with plaintiff's heads of argument an indication that plaintiffs at that stage were desirous to set the matter down for the determination of the special plea and exception taken in terms of the rules of court. The applicable rule is order 21 r 138 which deals with the procedure on filing a special plea, exception or application to strike out.

Rule 138 (a) provides as follows:

“When a plea exception or application to strike out has been filed-

- (a) The parties may consent within 10 days of filing to such special plea exception or application being set down for hearing in accordance with subrule (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." (the underlining is mine).

The exception and special plea in this matter was set down on 14 January 2016 pursuant to an application for a set down filed on 13 October 2015 at the instance of plaintiff's legal practitioners Manokore Attorneys of Harare.

Neither party raised issue in their heads of argument with this flagrant non-compliance with the rule prohibiting a set down of a special plea exception or application to strike out before trial where set down has not been in compliance with r 138 (a) or (b) quoted above.

At the hearing of the matter no point in *limine* was taken by the respondents regarding the invalidity of the set down of the matter on account of its (set down) being in violation if r 138 (c) and the court raised the issue *mero motu*. In response Advocate *Girachi* who appeared for the plaintiffs argued that r 138 had been abrogated by disuse as it was impossible to comply with in view of the need to comply with the requirement to file heads of argument before setting down of an exception or application to strike out a matter where parties are to be represented by legal practitioners at the hearing in terms r 238 (i) (a) of the rules of this court.

Rule 238 (1) (a) provides as follows:

“(1a) an application exception or application to strike out to which subrule applies shall not be set down for hearing at the instance of the applicant or excipient as the case may be unless

(a) his legal practitioner has filed with the Registrar in accordance with subrule (1) –

(i) heads of argument; and

(ii) proof that a copy of the heads of argument has been delivered to every party and

(b) ...”

Counsel cited no authority in support of the position that the rule had been abrogated by disuse. He however urged the court in the alternative to condone the non compliance with the rules by exercising the court's discretion in terms of r 4 (c) in order to do justice in the matter as it would be difficult to progress the matter to trial without disposing of the exception and special plea which could only serve to burden the trial court. It is a cause for concern that there is a growing tendency of legal practitioners becoming too relaxed in their observance of the rules of this court taking it for granted that the court will readily condone noncompliance with rules when moved to use the discretion vested in the court by r 4 (c). Regrettably when legal practitioners are faced with an inexcusable breach of obvious and salutary provisions of the rules they cry foul and resort to arguing that the rules are meant for the court's convenience in its quest to do justice

between litigants and not vice versa. Even though as a matter of principle it is correct that rules should not be rigidly applied there is a real risk that unchecked resort to relax action of application of rules could further undermine the quality of legal representation in the superior courts.

I entirely agree with Advocate *Chadambuka* who citing the case of *Mazibuko v Ndebele* 2008 (2) ZLR 26 at 29 A and *General Leasing v Allied Timbers* HH 76/2015 submitted that not only is r 138 (c) fully and currently in force but its provisions are peremptory. It was on the basis of the foregoing that I declined to use the discretion versed in the court by r 4 (c) to condone the non-observance of peremptory provisions of the rules of court especially considering that set down was only applied for more than a year outside the period provided for by the rules. In the circumstances I declined to hear the matter and dismissed it with each party paying its own costs as it was not properly before the court.

Atherstone & Cook, plaintiffs' legal practitioners
Ngarava, Moyo and Chikono, 1st defendant's legal practitioners
Chambati, Mataka & Makonese, 2nd defendant's legal practitioners
Mapondera & Company, 3rd defendant's legal practitioners