FUTURE CHIRANGO MUVIRIMI
and
PETRONELLA MUVIRIMI
and
DEEPSTAR INVESTMENTS (PVT) LTD
and
LEONFAR INVESTMENTS (PVT) LTD
and
DOWNTOWN PETROLEUM (PVT) LTD
versus
RAMSWAY INVESTMENTS (PVT) LTD
and
SIMON GEORGE WILBURN RUDLAND
and
LETHOUT INVESTMENTS (PVT) LTD
and
FOREGHIN (PVT) LTD
and
GAMESCO INVESTMENTS (PVT) LTD
and
METWAX PROPERTIES (PVT) LTD
and
MARK RICHARD STONIER
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 June, 2018 and 21 June, 2018

**Opposed Matter**

*W. Ncube*, for the applicant
*Advocate T. Mpofu* for the respondent

MANGOTA J: This case has the characteristics of a see-saw. The plaintiff sued the defendant. The defendant excepted to the suit. It also raised a special plea and an application to strike out. The plaintiff raised four *in limine* matters. It raised those in its heads of argument. It submitted that the defendant's exception, special plea and application to strike out were not compliant with the rules of court. It moved that those be expunged from the record.

The parties' respective positions can easily be gleaned from a reading of the sequence of events. It runs as follows:

i. 18 November, 2015 the plaintiff served on the defendant its summons and declaration;
ii. 20 November, 2015 the defendant served on the plaintiff its notice of appearance to defend;
iii. 4 December, 2015 the defendant served on the plaintiff its request for further particulars;
iv. 16 February, 2016 the plaintiff served on the defendant its further particulars;
v. 21 March, 2016 the defendant served on the plaintiff its request for further and better particulars;
vi. 13 May, 2016 the plaintiff served on the defendant its refusal to furnish further and better particulars;
vii. 30 June, 2016 the defendant served on the plaintiff its letter of complaint in terms of Rule 140 of the High Court Rules, 1971;
viii. 11 July, 2016 the plaintiff filed an amended summons and declaration;
ix. 18 July, 2016 the defendant served on the plaintiff its special plea, exception and application to strike out;
x. 19 July, 2016 the plaintiff served on the defendant a letter which advised the latter that it (plaintiff) filed the amended summons and declaration on 11 July, 2016
xi. 20 July, 2016 the plaintiff served on the defendant the amended summons and declaration;
xii. 22 July, 2016 the defendant served on the plaintiff a letter in which it advised the latter that its amended summons and declaration were bad at law;
xiii. 11 August, 2016 the defendant served on the plaintiff its heads of argument;
xiv. 16 August, 2016 the defendant set down the exception, special plea and application to strike out;
xv. 12 January, 2017 the plaintiff filed its heads of argument.

It is evident that the summons and declaration which the plaintiff filed on 13 November, 2015 lacked precision. Even the further particulars which the plaintiff furnished on 16 February, 2016 could not cure the defects which were inherent in the same. The filing of the amended summons and declaration constitutes the plaintiff's concession of the observed fact.

On 21 July, 2016 the defendant addressed a letter to the plaintiff. It stated, in the same, that the amended summons and declaration were bad at law because these were neither consented to nor ordered by the court. It insisted that they were void.

The question which begs the answer is whether or not the amended summons and declaration were properly filed. Their heading shows that they were filed in terms of Rules 132 and 133 of the High Court Rules, 1971.

Rule 132 enjoins a party which intends to alter or amend its pleadings to secure the consent of the other party. Where it fails to secure such, the party can only alter or amend its pleadings with leave of the court. Rule 134 is also to an equal effect.

The plaintiff filed its amended summons and declaration without the consent of the defendant. There is no evidence which shows that it sought and was granted leave of the court to file those as it did.

The filing of the amended summons and declaration, no doubt, violated Rules 132 and 134 of the High Court Rules, 1971. It was, as the defendant correctly stated, bad at law. Its effect is that the plaintiff filed nothing.

The plaintiff's statement is that the defendant violated Rules 119, 142 and 138 of the rules of court. Two events place its position into context. These are the date on which it refused to furnish the defendant with further and better particulars as read against the date on which the defendant filed its special plea, exception and application to strike out. These are respectively stated as 13 May, 2016 and 18 July, 2016.

Simple mathematical calculation shows that, in terms of Rule 119, the defendant should have filed its special plea, exception and application to strike out twenty days from the date that further and better particulars were refused. These were refused on 13 May, 2016. It should, therefore, have filed its special plea, exception and application to strike out on 13 June, 2016. The reality of the matter is that it did not do so.

It was only after and not before the deadline of 13 June, 2016 that the plaintiff could have acted in terms of Rule 80 of the rules of court. It could, if such was its intention, have given the defendant five (5) day's notice of intention to bar. It did not.

The defendant did not apply to compel the plaintiff to furnish it with further and better particular. Its case, therefore, fall under r 142 (b) of the High Court Rules, 1971. In terms of the mentioned rule, it had to wait for twelve (12) clear days before it took its next action. These are calculated from 14 June 2016. It should have filed its special plea, exception and application to strike out during the period which extended from 14 to 29 June 2016. It did not. It only filed these on 18 July 2016. The reality is that it was thirteen (13) days out of time when it filed the special plea, exception and application to strike out.

The defendant filed its special plea, exception and application to strike out on 18 July 2016. In terms of r 138, it had ten (10) days within which it should have, with the consent of the plaintiff, set the matter down for hearing. It, therefore, should have set it down on, or before, 1 August 2016. Where it did not secure the consent of the plaintiff, as *in casu*, it could have set it down within a further period of four (4) days. These are calculated from the deadline of 1 August 2016. It should, therefore, have set down the special plea, exception and application to strike out on any day during the period which extended from 2 to 5 August 2016. If it had done so, it would have complied with r 138 (b) of the rules of court. It did not. Its setting down of the matter on 16 August 2016 violated para (c) of r 138 of the High Court Rules, 1971. That is so because it set down the special plea, exception and application to strike out seven (7) clear days out of time.

The above analysed matters show that the defendant violated r 119, 142 and 138 of the High Court Rules, 1971. The provisions which it stands in breach of are peremptory. They admit of no choice on its part. They must be adhered to in the strict sense of the word.

The defendant's assertion which is to the effect that its meeting of the timelines which are stated in the rules of court was affected by its intention to have the plaintiff replicate to its special plea, exception and application to strike out it misplaced. The rules of court do not require the plaintiff to replicate to its special plea, exception and/or application to strike out.

Rule 125 of the High Court Rules, 1971 upon which it anchored its argument does not apply to matters which relate to special pleas, exceptions and /or applications to strike out. It only applies to a situation where a defendant pleads over to the merits.

A plea is, in terms of r 116 (1) of the rules of court, the defendant's answer to the plaintiff's declaration. It sets forth in a clear and concise manner the nature of his defence. It deals with the allegations which are in the declaration as provided by subr (2) of r 104.

Rule 104 of the rules of court deals with matters which must be specifically pleaded. Subrule (2) of r 104 reads:

> "(2) … every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He should admit or deny every allegation, or state that he has no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted. The same rule shall apply to every allegation in subsequent pleadings, except where a joinder of issue is justified."

It is evident, from the foregoing, that the defendant misconstrued the meaning and import of r 125 of the rules of court. Its misconstruction emanates from its reading of *Khan* v *Muchenje & Anor*, HH 126/13 with which I respectfully disagree. The view which I hold of

the matter is that a litigant is not obliged to indicate to the court and the other party that he opposes the exception. The court in the *Khan* case accepted, and correctly so, that there is no rule which specifically provides for what it pronounced. What is not provided for in the rules cannot, in my view, be read into them. The matter is as simple as I state it.

Both parties to this case violated the rules of court. The plaintiff violated Rules 132 and 134. It filed its amended summons and declaration in breach of the mentioned rules. The defendant violated Rules 119, 138 and 142. It did so when it filed its special plea, exception and application to strike out. The rules which each party stands in breach or are peremptory. They do not admit of any discretion on the part of the party. Process which is filed in breach of the stated rules of court is treated as if it was never filed.

Neither the plaintiff nor the defendant sought any condonation for its breach of the rules of court. The amended summons and declaration which the plaintiff filed on 11 July, 2016 are expunged from the record. The special plea, exception and application to strike out which the defendant filed on 18 July, 2016 are, for the same reason, also expunged from the record. The net effect of the stated matter is that the status *quo ante* the purported filing of the parties' respective processes obtains. I am, in the mentioned regard, indebted to the plaintiff which drew my attention to *Moyo & ors* v *Austin Zvoma & anor*, ZWSC 28/10 wherein CHIDYAUSIKU CJ, dealing with process which a party filed in flagrant breach of the rules of court, struck its case off the roll. The current is one such matter where neither party's case can be allowed to stand. It is, in the result, ordered as follows;

1. That the plaintiff's amended summons and declaration be and are hereby struck off the roll.
2. That the defendant's special plea, exception and application to strike out be and are hereby struck off the roll.
3. That each party pays its own costs.

*Thompson Stevenson & Associates*, 1st – 5th plaintiffs' legal practitioners
*Atherstone & Cook,* 1st – 7th defendants' legal practitioners