

**MUNYUKI JOE MAPONGA**

Versus

**NTOMBIYEMPILO THATA**

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 6 MAY, 7 JUNE & 13 DECEMBER 2024

***Plea in Bar.***

*Mr. R.G. Zhuwarara*, for the applicant/defendant.

*Adv. L. Nkomo*, for the respondent/plaintiff.

**NDLOVU J:** On 13 July 2023, the plaintiff issued a summons out of this court regarding the distribution of the parties' property following their divorce. The Defendant entered an appearance to defend the action and a plea in bar to the claim.

**BACKGROUND FACTS.**

The parties were married in Zimbabwe on 16 April 2006. The marriage later broke down and a decree of divorce was granted on 10 December 2010 by Luton County Court in England. On 13 February 2017, Plaintiff instituted proceedings for the division of the parties' property in the High Court Harare under Case No *HC 1295/17*. The matter reached the trial stage and was set down for trial before CHAREHWA J. On 21 September 2018, the Court removed the matter from

the roll under the hand of CHIRAWU-MUGOMBA J. The removal of the matter from the roll was not accompanied by the reasons and/or tasks that a party had to attend to before the matter could be reinstated on the roll.

No steps were taken to prosecute the matter within 3 months from that date and the matter lapsed by operation of the law. The closest the Plaintiff came towards prosecuting the matter was by an application to amend the claim filed in 2019 under Case No. *HC 4565/19*. Likewise, that application was not prosecuted to finality leading to its dismissal for want of prosecution on 7 October 2019.

The Plaintiff then shifted base, abandoned the proceedings in the High Court in Harare and filed fresh proceedings with the High Court in Bulawayo. Defendant considers this procedure to be flawed in that Plaintiff ought to have reinstated the proceedings in the High Court in Harare instead. In Defendant's view, Plaintiff's conduct amounts to forum shopping. In any case, according to Defendant, Plaintiff's claim has prescribed.

### **RELIEF SOUGHT.**

The plaintiff's claim be dismissed with costs on an attorney and client scale.

### **ISSUES.**

1. *Whether or not the Plaintiff is barred by issue estoppel to institute these proceedings in the High Court in Bulawayo.*
2. *Whether or not in filing this claim in Bulawayo the Plaintiff embarked on a wrong procedure and is forum shopping.*
3. *Whether or not the Plaintiff's claim has prescribed.*

## THE LAW

### ***Whether or not the Plaintiff is barred by issue estoppel to institute these proceedings in the High Court in Bulawayo.***

Issue estoppel prevents a party from relitigating an issue that has already been decided in another proceeding. It is common sense that it prevents different courts from reaching conflicting decisions on the same issue and by extension encourages the finality of litigation. It applies when the issue is an essential part of the claim or defence in both proceedings and the parties are the same. It is a branch of *res judicata* which is when the cause of action itself is finally determined. *Estoppel* is a rule of evidence whereas *res judicata* is a principle of jurisdiction.

On the facts of this case, issue estoppel does not arise because the proceedings in Harare were not concluded and nothing was decided be it in terms of evidence or cause of action. The plea is therefore dismissed.

### ***Whether or not in filing this claim in Bulawayo the Plaintiff embarked on a wrong procedure or forum shopping.***

I must begin by stressing the need for legal practitioners to choose their diction carefully be it in oral arguments or pleadings. It is rather embarrassing, to say the least, that a legal practitioner titles an issue something different from the substance of his pleading. Ultimately the court will go by the substance of the pleading/issue but we should not find ourselves in that position in the first place. Where an issue is misnamed a litigant confuses the other party and the court and unnecessarily delays the resolution of the dispute between the parties. In this case, the Defendant named the issue of opening the proceedings in Bulawayo when the Harare proceedings had lapsed an “*irregular process/proceedings*”.

The Rules of this Court provide for “*Irregular proceedings*” in Rule 43. No mention of Rule 43 was made by the Defendant in his pleadings. The substance and thrust of his argument were all about a violation of Rule 66 of the High Court Rules, 2021 and nothing else.

Rule 66[3] provides as follows:

***“(3) Where a directive has not been given in terms of sub-rule 2 and a matter which has been.....removed from the roll is not set down within three [3 ] months from the date on which it was .....removed for the roll, such matter shall be regarded as abandoned, shall be deemed to have lapsed and the Registrar shall advise the parties accordingly.”***

Practice Direction No. 1 of 2022 in part provides as follows:

***“2.1 If the summons in an action..... having been served, the plaintiff has not, within the time stipulated in the High Court Rules, 1971, taken further steps to prosecute the action, the summons shall lapse.***

***2.2.....***

***3.1.....***

***3.2 Where a summons has lapsed as provided for in paragraph 2.1, it cannot be brought back to court without the leave of a judge”. [my underlining]***

There is only one High Court and one Judge President in Zimbabwe. Filing a matter in Chinhoyi is as good as filing the matter in Mutare. What binds a litigant in terms of procedure in Masvingo applies with equal measure to that litigant in Harare. Filing this action in Bulawayo as he did, was improper and against the Rules of this court. The Plaintiff’s conduct amounted to what might be taken to be forum shopping. In the absence of evidence, however, pointing towards a safe conclusion that Plaintiff filed his action in Bulawayo in the belief or knowledge that the Bulawayo Judges of the High Court would rule in her favour, I do not find it established that he was forum shopping.

The Plaintiff should have applied for the reinstatement of ***HC 1295/17*** to a Judge of the High Court in chambers. That matter was not decided on the merits and had lapsed by operation of the

law. The rules dictate that it cannot just be brought back to the roll without an order for its reinstatement from a Judge.

***Whether or not the Plaintiff's claim has prescribed.***

This is a special plea. It calls for evidence. The Defendant has adduced none. In any case, because of the decision I have made concerning the propriety of this matter being filed in Bulawayo as it was done, it would be improper for me even if the special plea had been properly prosecuted to pronounce myself on it at this stage. I therefore dismiss this special plea.

**DISPOSITION**

For the above reasons, the plea in bar is upheld only in respect of filing a fresh summons in Bulawayo instead of applying for the reinstatement of the matter in Harare under HC 1295/17. This matter is therefore improperly before the court and is accordingly struck off the roll.

**ORDER**

1. The plea in bar be and is hereby upheld with costs on an attorney and client scale.
2. The main action matter be and is hereby struck off the roll.

***NDLOVU J.***

*Mushoriwa Pasi Corporate Attorneys, Applicant/Defendant's Legal Practitioners.*

*Masamvu & Da Silva-Gustavo Law Chambers, Respondent/Plaintiff's Legal Practitioners.*

HB 189/24

HC 1445/23

X-REF SUMM 575/23

X-REF HC 1295/17

X-REF HC 4565/19