

TAPIWA MARK CHIMOMBE  
versus  
AUDREY RUNGANO CHIMOMBE (NEE MAGUME)

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 8 September 2020 & 18 February 2021

### **Special Plea**

*H Nkomo*, for the plaintiff  
*J Ndllovu*, for the defendant

MANZUNZU J This ruling relates to a point *in limine* raised by the plaintiff to the defendant's plea in bar/abatement.

The brief background of the matter is that the parties are married in terms of the Marriage Act, [Chapter 5:11]. On 18 February 2019 the plaintiff instituted divorce summons under case number HC 1271/19. On 5 March 2019 the defendant entered an appearance to defend and subsequently filed a plea and claim in reconvention on 7 March 2019. On 20 March 2019 the plaintiff filed a replication to defendant's plea and also filed a plea to the defendant's claim in reconvention. On 8 May 2019 the plaintiff withdrew his action against the defendant under HC 1271/19. The defendant did not follow suit to withdraw the counter-claim.

The withdrawal of the plaintiff's claim rendered the defendant's appearance to defend, defendant's plea and plaintiff's replication to defendant's plea nugatory. The parties differ on its effect to the counterclaim and plaintiff's plea to the claim in reconvention. Having withdrawn his divorce action in HC 1271/19 the plaintiff proceeded to file this second divorce action on 7 February 2020 under HC 950/20. It is in respect of this second action that the defendant filed a special plea of *lis alibi pendens*. The defendant is saying there is litigation pending between the parties on the same action in respect of the same subject matter under Case number HC 1271/19. The defendant's position is that the counter-claim in HC 1271/19 is still pending before this court hence there is duplication of actions. She seeks dismissal of the plaintiff's claim in HC 950/20 with costs. However, I believe on second reflection in the heads of argument the defendant seeks that case number HC 950/20 be stayed pending the finalization of divorce action under case number HC 1271/19.

The defendant filed a plea in abatement on 19 June 2020 followed with heads of argument on 24 June 2020 and proceeded to file a notice of set down on 29 June 2020 for the hearing of the special plea. The plaintiff filed replication to the defendant's special plea on 2 July 2020 and raised a preliminary point that the defendant used the wrong procedure as it robs the parties the opportunity to lead evidence.

Mr *Nkomo* who represented the plaintiff argued in support of the preliminary point taken that there was need for oral evidence to be led in dealing with the plea of *lis pendens*. He said the matter cannot be disposed on the basis of pleadings and heads of argument as if it were an exception. He relied on a plethora of authorities to support his argument. First was the case of *Cabat Trade and Finance v Movement of Democratic Change*, SC 50-12 where MALABA DCJ (as he then was) had this to say,

“A special plea is a plea in trial susceptible of a replication and must be heard separately on the adduction of evidence. *Doelcam v Pitchanik and ors* 1999 1 ZLR 390 (H) 396 G-E.”

In an earlier case of *Edwards v Woodnut* NO 1968 (4) SA 184 (R) BEADLE CJ stated,

“... the basic difference, however, between an exception and a plea in abatement is that in the case of a plea in abatement evidence must be led, whereas in the case of an exception the fact stated in the pleadings must be accepted.” (my emphasis).

In the recent case of *Brooker v Mudhanda & Another*, SC 5/18, GOWORA JA had this to say;

“It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea.”

Mr *Ndlovu* who represented the defendant does not dispute the position of the law as per authorities cited by Mr *Nkomo*. He however took the simple position that the need to adduce evidence should only arise where there are disputes of fact. In *casu*, he said the parties were in agreement that there was a pending matter Case number HC 1271/19. He said this was a case where the court can determine the matter based on the papers filed of record.

A special plea introduces fresh facts which do not appear from pleadings hence the need to lead oral evidence. In my view that is if only the introduced fresh facts are in dispute. Mr *Nkomo*'s position is that the introduced fresh facts are in dispute and Mr *Ndlovu* says they are not. The resolution lies in the pleadings themselves. Is there congruency in the facts pleaded by the defendant and the replication by the plaintiff. Are the parties in agreement or not. If they

are not in agreement, is the disagreement so material such as to affect the proper exercise of the discretion by the court.

Paragraphs 1 and 2 of the defendant's plea is a narration of some of the pleadings filed of record in case number HC 1271/19 to which plaintiff accedes to. The withdrawal of the plaintiff's claim in HC 1271/19 is a matter of common cause. However plaintiff has raised issues surrounding such withdrawal and has claimed mala fides on the part of the defendant calculated to the present scenario. Plaintiff denies duplication of actions and has raised other triable issues which certainly cannot be resolved on paper. He challenges the prayer by the defendant that the action be dismissed with costs. This is a matter, in my view, which must not be treated as an exception to the general rule which requires the leading of evidence. If defendant intended to curtail the proceedings by not leading evidence then she could at least have settled for a stated case with the plaintiff.

The plaintiff prays for the dismissal of the special plea with costs. Is that an appropriate remedy when the special plea was not heard on merits? Certainly not. The plaintiff has succeeded to show that the procedure adopted by the defendant in setting down the special plea for argument without the hearing of evidence is improper.

Disposition:

1. The point *in limine* raised by the plaintiff be and is hereby upheld with costs.
2. The parties shall lead evidence before a ruling on the special plea.

*Mhishi Nkomo Legal Practice*, plaintiff's legal practitioners  
*Mtewa & Nyambirai*, defendant's legal practitioners