HWANGE COAL GASIFICATION COMPANY
versus
PHILCOOL INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 22 & 25 November 2021

DATE OF JUDGMENT 8 February 2022

Defendant's Special Plea

T. Zishiri, for the Defendant
Mr. T. Gadzirai, for the Plaintiff

MAKOMO J:

[1] The plaintiff sued out summons against the defendant for payment of a sum of USD247 317.50 which the defendant owed it following breach of a contract entered into between the parties. After entering an appearance to defend, the defendant elected to utilize alternatives to pleading available to it and filed a special plea instead of pleading over on the merits. The special plea is based on two grounds, firstly, that the plaintiff, being a company is improperly cited as Hwange Coal Gasification Company only omitting the words (Pvt) Ltd. It is argued that, for that reason, there is therefore no plaintiff in this matter which renders the summons a nullity. Secondly, it is argued that since the acknowledgment of debt, on which the cause of claim is based was signed on 5 June 2018, defendant's obligation to the plaintiff is subject to Statutory Instrument 33 of 2019, thus the amount claimed ought to have been expressed in RTGS dollars and not United States Dollars.

[2] The plaintiff is in the business of production of coal and coke products in Hwange. Its market base extends as far as other countries such as Zambia. In that regard, on 14 September 2017 the parties entered into a contract in terms of which the defendant, a company in haulage transport business, would transport plaintiff's coal and coke products to its clients in Zambia.

[3] A week later, on 21 September 2017 the two parties further entered into a fuel supply agreement with a third party, namely, Headbolls Investments (Pvt) Ltd ("Headbolls") where plaintiff would make advance payments for fuel to Headbolls, in turn Headbolls would deliver the purchased fuel at Zuva Petroleum depot in Hwange for use by the defendant to transport plaintiff's products. The defendant stood as surety on behalf of Headbolls and undertook to repay the debt should Headbolls fail to deliver the fuel paid for by plaintiff. By January 2018, plaintiff had made advance payments for fuel in terms of the tripartite agreement amounting to USD117 000, which fuel Headbolls failed to deliver as per the contract.

[4] During about the same period plaintiff made advance payments to defendant for the loads it was going to transport to Zambia. It came to light after a reconciliation that loads amounting to USD25 917.50 were still outstanding.

[5] Further, it was realized by the plaintiff that a total of twelve loads of coke which had been loaded by defendant at specific request of plaintiff as per contract had not been delivered to the intended clients. The twelve loads had a combined value of USD104 400.

[6] The value of the fuel paid, advance transport costs and the undelivered cargo brought the defendant's indebtedness to the plaintiff to USD247 317.50.

[7] On 5 June 2018, the defendant being represented by one Shepherd Tundiya executed an acknowledgment of debt wherein it acknowledged owing the plaintiff the sum claimed in the summons and undertook to pay "as quickly as possible". Despite that undertaking, the defendant has allegedly failed, refused or neglected to pay.

[8] Consequently, the plaintiff has now filed summons claiming the amount owed, interest at the prescribed rate plus costs.

[9] As already alluded to, the defendant then raised a special plea as described. Instead of replicating the special plea and file heads of argument before setting down the matter, the plaintiff's lawyers immediately set down the special plea for hearing in terms of r 138 (b) of the High Court Rules, 1971 ("the old Rules) without such replication and heads. It is unfortunate that the lawyers have renounced agency and did not appear on the date set down for the hearing of the special plea. Lawyers have a duty to acquaint themselves with procedure

to avoid elementary errors prejudicial to their clients and also mislead the court. Where a special plea is filed, the plaintiff is enjoined to file a replication together with heads of arguments before the matter is set down for hearing. The reason for this is simple and goes to explain the nature of a special plea as opposed to an exception in that where a special plea is raised, new facts which do not appear *ex facie* the record are raised and the plaintiff must rebut those facts through a replication. This is so because the new facts introduce a new dispute which must be responded to by the plaintiff. Where the plaintiff fails to replicate, as *in casu*, the general rule is that the matter will be heard as unopposed. This is so because there will be no dispute as regards the facts raised in the special plea, which facts are absent from the plaintiff's declaration or particulars of claim. The Supreme Court set out the position in *Jennifer Nan Brooker & Anor v Richard Mudhanda & Another* SC 5/18 at p13:

> "After being served with the special plea of prescription, the respondent should have replicated. The purpose of a replication is to inform the court and the defendant of the plaintiff's rebuttal to the special plea. The failure by the respondent to file a replication to the special plea means that there are no disputes for determination on the special plea. In the absence of such replication, there would be no issue for determination by the court a *quo*."

[10] The awkwardness of the situation in which plaintiff found itself in on the date of the hearing was further heightened by the fact that the owners of the company were firmly ensconced in China and no appearance for it was made. Doubting the circumstances under which service had been made to erstwhile lawyers who had since duly filed their notice of renunciation of agency, I directed that the plaintiff be served at the last known address and postponed the matter. At the resumed hearing, only an employee appeared on behalf of the company. The employee was clearly overawed by the proceedings and the nature of legal issues the court had to be addressed on. His only mandate which he carried was to seek a further postponement of the case, informing the court that the directors of the company were in China and were attempting to smoke the peace pipe with the erstwhile lawyers whom they were engaging to represent them once again. After considering the circumstances of the matter I dismissed the request for a postponement, more particularly that the renunciation had been filed more than two months before and after the set down of the matter by the Plaintiff itself; the Plaintiff's directors had not done anything to engage another legal practitioner or, better still, negotiate with the erstwhile lawyers as they were now doing well in time in the knowledge of the impending hearing.

[11] The matter proceeded on the basis that in the absence of a replication there was no opposition to the special plea. It is salutary practice that notwithstanding that the matter is not opposed, the court must still be satisfied that the claim is established by pleadings and evidence. In other words, a court will not grant judgment in default merely on account that the respondent or defendant has failed to oppose. This is important for the reasons that I now turn to.

[12] I have already stated the two bases upon which the special plea has been raised. That the summons omit the words (Pvt) Ltd on the name of the plaintiff thus rendering the summons defective as there is no known plaintiff answering to the name Hwange Coal Gasification Company and further that the acknowledgment of debt giving rise to the cause of claim was signed on 5 June 2018 which means that the obligation is subject to Statutory Instrument 33 of 2019, therefore, the claim was supposed to have been expressed in RTGS dollars on a one is to one rate with the United States Dollars. Now, closely looking at these two bases one will easily see that these are grounds appearing *ex facie* the declaration and no evidence will be required to prove them.

[13] When I asked *Mr Zishiri* for the defendant to explain what extrinsic evidence would be required to prove the bases of the special plea, he conceded that there was no need to lead evidence on the applicability of Statutory Instrument 33 of 2019 as the argument could be resolved on the facts as they appear on the record. He however, sought to submit that a certificate of incorporation may be required to be produced to show that the correct name of plaintiff is Hwange Coal Gasification Company (Pvt) Ltd. This was notwithstanding that nowhere in the special plea is it mentioned that the defendant would lead evidence and the nature thereof. It shows without doubt that what the defendant envisaged was a mere argument based on the pleadings as they stood. To my mind, defendant is clutching at straws as the declaration itself is clear that plaintiff is an incorporated company and those words ought not to have been omitted. It means the defects complained of both appear *ex facie* the record. They appear within the four corners of the plaintiff's pleading and the defendant's defence is also originating from the declaration itself. They are purely legal arguments or points of law requiring no evidence to be led. The result is that defendant was supposed to proceed by way of an exception as opposed to a special plea.

[14] The differences and reason for adopting either of the two procedures as opposed to using them interchangeably is aptly summarized by authors Herbestein & Van Winsen in their seminal work *The Civil Practice of the Supreme Courts of South Africa,* 5th ed Volume 1 pp 599-600 where they authoritatively state that:

> "The essential difference between a special plea and an exception is that in the case of the latter, the excipient is confined to the four corners of the pleading. The defence raised on exception must appear from the declaration itself; the excipient must accept as correct the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear *ex facie* the pleading. If they did, then the exception procedure would have to be followed. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the pleading, and those facts have to be established by evidence in the usual way …
> Thus, as a general rule, the exception procedure is appropriate when the defect appears *ex facie* the pleading whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect …." (emphasis added).

[15] In *National Employment Council for the Construction Industry* v *Zimbabwe Nantong International (Pvt) Ltd* SC 59/15, the Supreme Court confronted the question whether adoption of the wrong procedure between the two is necessarily fatal to either the exception or the special plea. After reviewing a long line of cases and other authorities Patel JA (as he then was) confirmed that, unlike in South Africa where the two may be used interchangeably, in this jurisdiction the distinction has been maintained. The learned Judge of Appeal concluded at p 11 of the cyclostyled judgment that:

> "As for the formulation of r 137(1) itself, there can be no doubt that it explicitly differentiates between special pleas on the one hand and exceptions on the other. Moreover, r 137 (2) clearly stipulates that different forms are to be utilized when one or the other procedure is followed. This tends to support the argument that r 137 (1) is to be strictly applied and that any deviation therefrom is to be visited with an adverse ruling."

See also *Doelcam (Pvt) Ltd* v *Pichanick & Others* 1999 (1) ZLR 390 (H) at 396.

The Judge however lamented the absence of guidance from the particular Rule as to whether this position invariably applies in every case irrespective of the circumstances. In the absence of such guidance he was of the view that he could exercise his discretion.

[17] This special plea was filed in terms of Rule 137 of the High Court Rules, 1971 ("the old Rules"). The Rule provides:

> "**137. Alternatives to pleading to merits: forms**
> (1) A party may—
> (a) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;
> (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;

> (c) apply to strike out any paragraphs of the pleading which should properly be struck out;
> (d) apply for a further and better statement of the nature of the claim or defence or for further and batter particulars of any matter stated in any pleading, notice or written proceeding requiring particulars. [Subrule amended by s.i. 120 of 1995]
> (2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed." (emphasis added).

[18] My interpretation of r 137 (1) (a) is that a plea in bar or abatement can only be taken when the substance relied on does not involve going into the merits of the matter. Once the defendant relies on a fact or averment on the merits to prove the defect complained of, thus requiring the court to consider the merits of the matter in order to determine the plea in bar or abatement then the special plea procedure is no longer available, an exception must be utilized. The failure to adopt the correct procedure, which I conclude is mandatory, is a failure to comply with the rule both in substance and in form.

[19] The use by the defendant of a special plea instead of an exception means that he failed to properly inform the plaintiff what it was expected to do in response, for if it was a proper special plea, the new facts not apparent from the declaration which it relied on for the special plea must have been stated. This would have enabled the plaintiff to replicate and inform it of the nature of facts or evidence it ought to have disputed. As demonstrated above, the bases of the defendant's special plea are both appearing *ex facie* the record leaving the plaintiff in a quandary as to what to replicate on. This is a further consideration which the court took into account in proceeding with the matter despite the plaintiff not replicating.

[20] The law is settled on what happens when a party fails to comply with a mandatory rule. In summary, it is that the use of a wrong form or failure to comply with a mandatory rule is fatal. The result is that the party is improperly before the court and his/her application ought to be struck off. To avoid such a consequence, the party falling foul of the rule must seek or apply for condonation and in the absence of such application the court cannot *mero motu* condone the party. The making of the application is necessary to trigger the discretion whether to condone or not and an explanation is also essential before a court can exercise such judicial discretion. This means that the condonation is not there merely for the asking, a proper application which meets the requirements for condonation must be made before the offending application is considered by the court. See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254

(SC); *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company of Zimbabwe (Pvt) Ltd & Anor* 2015 (2) ZLR 343 (H); *Inyanga Downs Orchards* v *Edward Buwu* HH 108/10.

[21] In light of the above, even though I raised the issue of non-compliance with r 137 with *Mr Zishiri* on 22 November 2021 before I postponed the matter, he did not find it necessary to seek condonation as is required by law. Instead, he proceeded to move that the special plea be upheld and in so doing, he urged me to use my discretion and hear the matter as per the *dicta* by Patel JA in *National Employment Council* case (*supra*). In other words, no application for condonation for non-compliance with r 137 was made. I cannot condone such non-compliance *mero motu* and the special plea ought to meet the consequence.

[22] In her fairly recent judgment in *Fungayi Munyorovi* v *Weston Sakonda* HH 467/21, DUBE JP discussed the fate of pleadings that fail to comply with Rules of the court and, in my view, extended the principles laid out in *Forestry Commission* (*supra*) and similar cases cited above. After considering many case authorities in this and other jurisdictions the learned Judge President distinguished between foundational pleadings which fail to comply with Rules in substance or form on the one hand and those which fail to comply with timelines provided for by the Rules on the other. The present matter falls within the former category. In the case of the former, she concluded that such pleadings are a nullity, incurably bad and not susceptible to condonation while the latter are only invalid and may be condoned by the court using its inherent jurisdiction in terms of Rule 7(C) of the High Court Rules 2021 after considering a proper application for condonation. At para [22] of the cyclostyled judgment, the court held that:

> "A fatally defective pleading is one that does not conform to the required substance or form prescribed in terms of the rules, see *Dabengwa & Anor v ZEC & Others SC 32-16.* A fatally defective pleading has a bearing on the cause of action. It is considered to be an inadequate pleading and cannot be a basis for any suit or action. A fatally defective pleading is a nullity. A nullity entails something that is null, or void. It is 'something that can be treated as nothing, as if it did not exist or never happened and is not considered as court process,' see *The Black's Law Dictionary, 4th Edition.* A pleading that is a nullity is not considered as a pleading and cannot be relied on…"

[23] And at paragraphs [34] and [35] the learned Judge President distinguished nullity from invalidity and the respective consequences to the pleadings as follows:

> "34. Consequently, a special plea or other pleading filed outside the provisions of the rules is invalid and constitutes an irregular step or proceeding taken contrary to the rules, see the *Russel Noach case*. Because the rules provide a remedy for noncompliance with the rules in the case of a defect, noncompliance with the rules gives rise to the question of validity of the

pleading. Where the noncompliance with the rules does not result in a nullity, it can be condoned. It does simply not follow that because a pleading has been filed out of time it is a nullity. The enquiry goes further than that. A breach of rule 119 in a case where a special plea is filed out of time is not visited with nullity.

35. The special plea filed by the defendant is impugned simply on the basis that it was not filed in terms of the rules and not on the basis of its form or substance, inadequacy or other flaw. Clearly therefore, the special plea is not in itself fatally defective and nor is it a nullity. The special plea filed by the defendant being an irregular step is invalid and condonable." (My emphasis)

[24] The defendant's special plea *in casu* has been found to be not in compliance with r 137 (1) – (2) in terms of both its substance and form. On the *Munyorovi* (*supra*) authority it is therefore a nullity which cannot be condoned.

[25] Accordingly, it is ordered that:

1. The special plea be and is hereby dismissed.
2. There be no order as to costs.

Kwande Legal Practitioners, defendant's legal practitioners