

NELSON J. A. STODDART

Versus

PETRO GIBSON

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 23 October 2023 & 06 June 2024.

SPECIAL PLEA.

Mr. K. Ngwenya, for the Applicant.
Ms. V. Chagonda, for the Respondent.

NDLOVU J:

FACTUAL BACKGROUND

Plaintiff caused summons to be issued against Defendant on 9 June 2023 for the delivery of a Bedford Truck and payment of certain sums of money. The Defendant was served on 12th June 2023. The Defendant entered an appearance to defend on 21 June 2023. The defendant did not file his plea within the prescribed time resulting in the Plaintiff filing and serving him with a Notice of intention to bar on 6 July 2023. On 14 July 2023, Defendant raised a special plea of prescription arguing that Plaintiff's summons is out of time and the claim has been prescribed.

POINT IN LIMINE

The plaintiff took a point in *limine* and argued that the special plea was filed out of time.

The Applicant argued the contrary and emphasised that *Rule 42[1]* of the High Court Rules, 2021 permits filing a special plea post the issuing and serving of a notice of the intention to plead or be barred. According to the Applicant, a plea, exception and special plea are all subsequent pleadings provided for in *Rule 37* and *Rule 42[1][a] – [d]*. In his understanding of the Rules, his Special Plea is properly before this Court and should be heard and granted.

THE LAW

Rule 37 provides as follows:

“37. (1).....

(2).....

(3). Where the Defendant has delivered a notice of appearance to defend, he or she may, subject to rule 39, within ten days after filing such appearance, deliver a plea with or without a claim of reconvention, or an exception with or without application to strike out or special plea.....”

[my emphasis]

Rule 39 provides as follows:

“39. (1) A party shall be entitled to give five days’ notice of intention to bar to any other party to the action who has failed to file his or her plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 8 at the address for service of the party in default.....”

Rule 42 provides as follows:

“42(1) As an alternative to the merits, a party may within the period allowed for filing any subsequent pleading;

(a) Take a plea in bar or in abatement where the matter is of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case:

(b).....

(c).....

(d).....” [my emphasis]

DETERMINATION

What is clear is that the filing of a plea or special plea is governed by *Rule 37(3)*. It has to be filed within 10 (ten) days after filing a notice of an appearance to defend. It is common cause that in this case the Applicant did not file his plea within the 10 days sanctioned by the Rules of this Court. This prompted the Respondent to bring into operation his rights granted unto him by *Rule 39(1)*. He called upon the Applicant to file his plea within 5 days of service of that notice or risk being barred. The response from the Respondent was the filing of the Special Plea. He did so in the belief that *Rule 42(1)* permitted him to do so. The issue is; Do the Rules permit him or not?

Every time a notice of intention to bar is issued at Plaintiff's instance calling upon Defendant to file a plea, Defendant must respond by filing the plea to the merits and nothing else or risk being barred. Failure to file a plea to the merits and instead filing something else within the period specified in the notice can only mean that the Defendant has not complied with the terms of the notice and is therefore barred.

Russel Noah P/L v Midsec North 1999 (2) ZLR 8

Adam Takawira v Tony's Panel Beaters and Spray Painters P/L HH 268/18

In *casu* the Applicant was called upon to file a plea. He did not. He therefore did not comply with the terms of the notice of intention to bar. By filing a special plea the Applicant did so out of time. The time for exercising that option had come and gone. That time was 10 days after filing the notice of an appearance to defend. The Applicant lost the procedural right to file the special plea when he received the notice of intention to bar and calling upon him to file his *plea* on the merits. He lost the right and opportunity to dictate the next procedural step in the action and became liable to be barred. His failure to timeously file the special plea automatically vested the Respondent with the muscle to direct what the next step in the action would be.

DISPOSITION.

For the foregoing reason that the special plea was filed out of time, I uphold the point in *limine* taken by the Respondent and therefore strike off the Applicant's special plea with costs and order as follows:

ORDER.

The Applicant's Special Plea be and is hereby struck off the roll with costs.

06 JUNE 2024.

T J Mabhikwa and Partners, applicant's legal practitioners.
Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners.