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and  
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and  
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and  
NEOTEL INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 15 & 22 March 2023

### **Unopposed Application**

**MUNANGATI-MANONGWA J:** The new High Court Rules being Statutory Instrument 202 of 2021 have ushered in challenges in as much as they have brought clarity in certain areas. The need to revisit and streamline the rules for the attainment of clarity, cohesion and practicality much needed to regulate and maintain a coherent justice delivery system calls for urgent attention. Rules should not have gaps nor leave the litigants or the court in a quandary as to what next to do in pursuing a certain procedure. Rule 42 is one such provision that requires attention as this case has shown.

The plaintiff herein issued summons against the defendants seeking cancellation of contract and damages arising out of an alleged breach. Upon service of the summons all the three defendants entered appearance to defend. Subsequently a special plea was filed on behalf of the defendants wherein the defendants pleaded that the plaintiff's claim had prescribed. Acting in accordance with the provisions of r 42 (8) the defendants filed their heads of argument at the same time that they filed their special plea. The plaintiff neither replied nor filed any heads of argument. The defendants set down the matter on the unopposed roll. This is where the issues arising in this judgment emanated from.

I hasten to state that r42(8) which pertains to the filing of a special plea demands that the heads of argument in support of the special plea be filed at the same time of filing the special plea. This rule

needs to be relooked at. This is because the party filing the special plea is obliged to file the heads of argument before having sight of the replication which the other party is allowed to file in terms of r 42(9) which is under scrutiny herein. This may not be an ideal situation as the filed heads may not address the issues that come up in the replication. I raise this observation because the whole process of filing the special plea starts from r 42 (8) followed by the ensuing set down procedure highlighted in r 42(9).

The issue that this court has to exercise its mind on is whether this matter is properly before it. It is pertinent to note that r 42 (9) provides for set down of the special plea where the other party is represented and has equally responded. It reads:

“(9) Where the other party is represented by a legal practitioner, he or she within ten days of receipt of the exception, special plea or application to strike out and the heads of argument accompanying it, file his or her replication and heads of argument and whereupon, the registrar shall give such party a set down date within a month from the date of filing.”

The rule is silent as regards what becomes the situation where the represented party does not file a replication and heads of argument. There is no mention of a bar. This is unlike rules 6 and 7 which specifically and unequivocally provide that failure to act in a certain manner within a certain period results in a bar operating against the errant party. The stated rules provide:

“(6) Within seven days of the entry of appearance to defend written notice thereof shall be served on the plaintiff or on his or her legal practitioner where the plaintiff sues by a legal practitioner, at the plaintiff’s address for service failing which the defendant shall be barred and such notice shall be in Form No 7.

(7) A defendant who has failed to enter appearance shall be barred”

It is this specificity that is lacking in r 42 (9). Assuming that the other party is barred automatically there is no guidance as to what the party who has filed heads of arguments should do and how they can set the matter down. There is thus a vast difference between the provisions of r 42 and the predecessor High Court Rules 1971 which clearly outlined the manner in which a special plea had to be dealt with regarding set down. Rule 138 of the High Court Rules 1971 provided as follows:

“138. *Procedure on filing special plea, exception or application to strike out*

When a special plea, exception or application to strike out has been filed—

(a) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with sub rule (2) of rule 223; [Paragraph amended by S.I. 126 of 1989 and S.I 120 of 1995]

(b) failing consent either party may within a further period of four days set the matter down for hearing in accordance with sub rule (2) of rule 223; [Paragraph substituted by S.I. 126 of 1989]

(c) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial”

The rule clearly provided step by step how the special plea would be set down and the period within which each step had to be taken ultimately providing that if within the stipulated period there has been no set down the special plea had to be decided at trial. In essence there was no confusion as regards set down. Thus r 42 (9) needs to be streamlined so as to provide clarity on the procedural steps to be taken pertaining to set down of the special plea when the other party has not responded.

The defendant’s counsel conceded that there is a gap in the rules. Further no justification was provided as regards why the matter had to be set down on the unopposed roll. This is further compounded by the nature of the special plea raised, it being one of “prescription.” There are circumstances which require the leading of evidence to buttress the allegation that a claim has prescribed. See *Jennifer Nan Brooker v Richard Mudhanda; Adrienne Staley Pierce v Richard Mudhanda & Anor SC5/18*. Nothing in the rules points to the fact that a case like this one can be heard on the unopposed roll. Rules 23, r 25 and r 64 provide for the matters which can be set down on the unopposed roll and these do not include a case where a special plea has been raised. That being so the court is not convinced that the unopposed roll is the proper forum to set down the special plea for determination.

In the result the matter is removed from the roll with no order as to costs.

*Saidi Lawfirm*, plaintiff’s legal practitioners  
*Colghlan Welsh and Guest*, defendant’s legal practitioners