

AMANDA BERKOWITZ (NEE COHEN)
and
WAVERLEY PLASTICS (PRIVATE) LIMITED
versus
ARON VICO
and
AA OMAR AND COMPANY
And
REGISTRAR OF COMPANIES N.O.

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 15, 18, 22 March & 12 May 2021

Opposed Application – Special plea

Mr *T Biti*, for the plaintiffs
Mr *H Mutasa*, for first defendant

CHAREWA J: This matter began as an application for a *declaratur* that the purported issue and allotment of 245 and 124 ordinary shares to first defendant and one Victor Cohen respectively is null and void; that the CR2 return of the allotment is irregular and therefore null and void; and consequently that the second applicant's shareholding did not change by virtue of these impugned issue and allotment. By judgment of this court on 13 November 2019, the matter was referred to trial, the disposal order of which judgment reads as follows:

“In the result it is ordered as follows;

1. The applicants' application and the first respondent's counterclaim are converted into trial actions.
2. The applicants' application is converted into the summons in this matter.
3. The applicants shall file their declaration within 10 days of this order.
4. The first respondent's notice of opposition and opposing affidavit shall stand as the appearance to defend.
5. The first respondent shall file his plea and counterclaim within 10 days of being served with the declaration in this matter.
6. Thereafter the ordinary rules of procedure shall apply.”

Rather than file their declaration as ordered, the plaintiffs appealed the decision of the court in SC 624/19. After reading the documents filed of record and hearing counsel, the Supreme Court struck the appeal off the roll on 28 May 2020, by consent, with costs against the plaintiffs (appellants). On 12 June 2020, the plaintiffs then filed their declaration as originally ordered.

On 19 June 2020, the first defendant filed an application in HC 3090/2020, to strike out the declaration for having been filed out of the time frame specified in paragraph 3 of the order of the court dated 13 November 2019 and without first seeking condonation. At the hearing of this matter first defendant undertook to, and did withdraw that application on 24 March 2021 as the relief sought therein is the same as the relief that will be achieved by the special plea raised in this matter and filed on 2 October 2020 after first defendant had been served with a notice to plead.

The special plea objects to the declaration as being

“...a nullity for having been filed outside the *dies induciae* that was fixed by the order of this Honourable Court (my emphasis) per Honourable Dube J. dated 13 November 2019.

THEREFORE, First defendant prays that: -

1. The defective declaration be struck out; and
2. The Plaintiff’s claim be struck off the Roll with costs on the higher scale.”

The first defendant’s heads of argument support the same proposition, that the declaration having been filed contrary to the provisions of the court order, is a nullity and should be viewed as if it never happened as it does not fall within the confines of r13. For these propositions the first defendant relies on *Ceck Enterprises v Sithole*¹, *Gong v Mayor Logistics (Pvt) Lt²* and *Steward Bank Ltd v Calendfab Services (Pvt) Ltd & 2 Ors*³.

The issue therefore arising from the special plea and the heads of argument is whether the declaration is a nullity for having been filed out of time in circumstances where condonation was not sought. However, in his oral submissions *Mr Mutasa* identified his issue as “*whether the appeal filed in SC624/2019 has the effect of suspending the order of the High Court.*” He went on to make submissions that the appeal was a nullity as it was filed against an in-appellable directive of the court. Therefore, the consequences of a void appeal is that the

¹ SC87/20

² SC2/17

³ HH142/17

special plea should be upheld. For this he relied on *Charle de Kock & Wilton Tobacco v Mike Madiro*⁴

Understandably, Mr *Biti* for the plaintiffs pointed out that what Mr *Mutasa* submitted on was not in the special plea and heads of argument. Neither was it even the case in the application to strike out the declaration in HC 3096/20. The question that the appeal was never made as it was void *ab initio* was never raised and hence the plaintiffs did not and could not address it. In any event, given that a substantive judgment was handed down, no concession is made that the appeal was defective. As to whether the declaration was out of time, Mr *Biti* submits that until the Supreme Court made its determination, the common law position is that the noting of an appeal suspends a judgment except in certain exceptional circumstances. Finally, he submits that the special plea is in any case improperly before the court it having been set down contrary to r138(c).

I must agree with Mr *Biti*. While the question of whether the appeal before the Supreme Court was a nullity or not is indeed a question of law, it is not the subject of the special plea. The defendant cannot be allowed to amend his special plea through oral arguments during the hearing to plug loopholes in his case. In any event, it is not for this court to determine that an appeal to the Supreme Court is a nullity and void *ab initio*. The order of the Supreme Court does not state the reasons for striking out the appeal.

Further and in any event, Mr *Biti* is also correct that the special plea is improperly before the court, it having been filed on 2 October 2020 with the heads of argument being subsequently filed only on 20 October 2020. The special plea ought to have been set down in terms of r138 by 16 October 2020, that is; within the aggregate 14 days required by the rules. Having failed to do so, the defendant ought to have pleaded over to the merits for the special plea to be determined at the trial.

I note that Mr *Mutasa*, for the defendant, makes no submissions in this regard. Indeed, he could not as the law is clear per *Sammy's Group (Pvt) Ltd v Meyburgh NO & Ors*⁵. R138 is mandatory. Anything done outside its provisions is improper unless condonation has been sought. The special plea should not have been set down outside the precincts of r138 as no condonation had been sought. It must now, if at all, be heard at the trial. The first defendant must plead over to the merits.

⁴ HH429/2004

⁵ SC45-15

Costs

Plaintiffs sought costs on the higher scale on the grounds that first defendant's actions are wrong and frivolous. Mr *Mutasa* made no submissions at all on that aspect. However, costs being in the discretion of the court, and punitive costs being warranted only in exceptional circumstances, and in any event, since I have made no determination on the substance of the special plea, costs should follow the result on the ordinary scale.

DISPOSITION

Accordingly, it is ordered that

1. The first defendant's special plea is stood down for determination at the trial;
2. The first defendant is directed to plead over to the merits of the claim within 10 days of this order;
3. The first defendant shall pay plaintiffs' costs of suit.

Messrs Biti Law, applicant's legal practitioners

Messrs Gill Godlonton & Gerrans, applicant's legal practitioners