HB 127/18
HC 1482/17

TAURAI BUYANGA

Versus

COLIN MERVYN KENDALL

And

ANTHONY STEWARD KENDALL

And

WILSON SEZI

And

LISTERFILL INVESTMENTS (PVT) LTD
t/a SMALL SCALE MINING SUPPLIES

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 11 JANUARY & 7 JUNE 2018

Unopposed Application

B. Dube for the applicant
T. Masiye-Moyo for the respondents

TAKUVA J: This matter was set down on the unopposed roll with the applicant seeking a default judgment.

The background to the matter is as follows:

On 6 June 2017 applicant who was the plaintiff under case number HC 1482/17 issued summons claiming against the defendants jointly and severally the following:

"(a) An order for payment of US$448 000,00 (due as damages) for loss of income (on the 32 milling plants) suffered by the plaintiff as a result of the violation by the 1st, 2nd and 3rd defendants of the parties confidentiality and non-circumvention agreement and or of the fiduciary duties owed by them at law to a company called Calomondin Trading (Pvt) Ltd of which company the plaintiff held or holds 25%. Despite demand the defendants have failed or refused to pay (see declaration).

(b) An order, further, for payment of damages for loss of income on 968 gold milling or processing plants suffered by the plaintiff as a result of the violation by the 1st, 2nd and 3rd defendants of the parties confidentiality and non-circumvention agreement and or of the fiduciary duties owed by them at law to a company called Calomondin Trading (Pvt) Ltd of which company plaintiff held or holds 25%. Despite demand the defendants have failed or refused to pay (see declaration).

(c) An order for payment of cost of suit on an attorney client scale, if the relief sought is opposed."

The defendants entered appearance to defend. Defendants requested further particulars which were supplied on 8 September 2017. On 6 October 2017, all defendants filed an exception and special plea. Subsequently 1st, 2nd and 4th defendants filed heads of argument to the special plea and plaintiff filed a reply. On 25 October 2017, defendants applied for a set down date by filling a blank notice of set down which was stamped by the Registrar of this court on the same date. The Deputy Sheriff was paid for service of the notice of set down on the 27th of October 2017. On 8 November 2017, plaintiff filed a notice of intention to bar and bar against 1st, 2nd and 4th defendants arguing that the special plea and exception had not been set down within 14 days as is required by the rules.

Defendants' counsel wrote to plaintiff's counsel advising that an application for set down of the exception and special plea was made in good time and that the defendants were not in charge of setting down matters. Plaintiff's legal practitioners did not respond, instead they proceeded to effect the bar arguing that 1st, 2nd and 4th defendants had failed to file their plea after 5 days notice to file their plea had expired. Plaintiff's legal practitioners then filed this application on the basis that since the defendants were barred the matter was unopposed, hence its appearance on the unopposed motion roll on 18 January 2018.

On that day defendants' legal practitioner argued that the matter was improperly before me because the special plea and exception whose set down date had been requested within 14

days had not yet been finalised. He argued further that the purported notice of intention to bar and bar issued on 8 November 2017 was invalid because the special plea was supposed to be finalised first. Defendants' legal practitioner also indicated that he had filed an application seeking directions from this court on the validity of the bar. The application was filed under HC 3200/17 and is still pending.

The crisp issue for determination is whether or not this matter should be treated as unopposed. Put differently whether or not the defendants complied with O21 r138. This rule states:

> "138. Procedure on filing special pleas, exception or application to strike out
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> When a special plea, exception or application to strike out has been filed –
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> (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;
> (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;
> (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."

In the present matter, there was clearly no consent that the matter be set down for hearing. Therefore par (a) *supra* is inapplicable. It is undeniable that defendants applied for a set down date to the Registrar within thirteen (13) days from the date of filing the special plea. Therefore r138 (b) applies. The question now becomes whether what the defendants actually did amounts to compliance with this paragraph.

Faced with a similar issue, MATHONSI J in *General Leasing (Pvt) Ltd* v *Allied Timbers Zimbabwe (Pvt) Ltd* HH-76-15 at p 3 stated that:

> 'The time frames set out in the rules have to be followed every step of the way in order to put the special plea, exception or application which is not meritable out of the way and get on with the business of completing pleadings. Where it has merit, the 1st prize is won. Therefore, where the other party has not consented to the special plea, exception or application to strike out within 10 days of their filing, the matter has to be set down for hearing within a further period of 4 days. With the procedure for set down currently in place at this court where litigants are required to submit an application for set down to the registrar before the matter is allocated a judge who would then give it a set down date, all the litigant is required to do to satisfy the provisions of that rule, is to file heads of argument in readiness and submit an application for set down. This has to be done within the four day period following the failure to consent." (my emphasis) See also *Mazibuko NO & Anor* v *Ndebele & Ors* 2008 (1) ZLR 26

These comments apply with equal force to the facts *in casu* in that the defendants filed an application for a set down date within the 4 day period following the failure to consent. Plaintiff's argument that a date for the hearing should have been allocated or obtained within 14 days is erroneous and impracticable. Further in terms of r138 (c) an exception that is not set down in terms of the rules will be heard at the trial. In my view, it is illogical therefore to argue that where an exception has not been set down the matter becomes uncontested. Also, it is not in dispute that there is a pending chamber application challenging the notice to bar and bar that was effected. The court should be given an opportunity to consider that application.

As regards costs, it is clear that the plaintiff has been unreasonable in refusing to see the points raised by defendants' legal practitioners. Even during the hearing counsel for the plaintiff submitted that in his view the matter should be heard on the merits but his instructions were to the contrary. Be that as it may, I am of the view that costs be in the cause.

In the circumstances it is ordered that;

1. The matter is improperly before the court.
2. The matter will not be set down on the unopposed roll until the special plea is set down.
3. The matter will not be set down on the unopposed roll until caser number HC 3200/17 has been finalised.
4. Costs shall be in the cause.

Sengweni Legal Practice applicant's legal practitioners
Masiye-Moyo & Associates incorporating Hwalima Moyo & Associates, respondents' legal practitioners