

CAIRNS FOODS PVT LTD.
versus
REDDY CASH AND CARRY (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 12 AND 25 SEPTEMBER, 2013

EXCEPTION

T. Nyamasoka , for the plaintiff
Ms G. Nyamayi , for the defendant

MATHONSI J: The plaintiff issued summons against the defendant on 4 March 2013 seeking an order for payment of US\$10 996,26 for goods allegedly sold and delivered to the defendant at its instance and request.

The defendant entered appearance on 13 March 2013 and filed a special plea in abatement protesting prescription as the cause of action allegedly arose about December 2009 or January 2010. At the same time the defendant pleaded over to the merits of the claim.

Clearly therefore the special plea should not have been set down before trial. Rule 138 of the High Court of Zimbabwe, Rules 1971 provides:

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

- (a) the parties may consent within 10 days of the filing to such special plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223.
- (b) failing consent either party may within a further period of 4 days set the matter down for hearing in accordance with subrule (2) of rule 223.
- (c) failing consent and such application, the party pleading specially, excepting or applying, shall within a further period of 4 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 or hearing before the trial”

The defendant applied for a set down on 30 April 2013 the same day that the plea was filed. There is nothing to suggest that there was any compliance with r 138(a) and (b) of the High Court rules. The defendant having pleaded over to the merits, the special plea should have been stood down until the trial date.

In the result, it is ordered that

1. The special plea is hereby stood down until the trial date.
2. The costs shall be costs in the cause.

Atherstone and Cook, Plaintiff's Legal Practitioner

Honey and Blackenberg, Defendant's Legal Practitioners