

TENDAI ALBERT MUTUKWA
and
WILFRED MAREKWA
and
DELTA CORPORATION LTD
versus
BRIAN ELLSE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 18 October 2018 & 31 October 2018

Opposed Matter

Ex Tempore Judgment

O Kondongwe, for the applicants
Respondent, *in default*

MUNANGATI-MANONGWA J: The applicants approached this Court seeking that its late filing and setting down of the applicant's exception be condoned and that the applicants be given leave to set down their exception within 10 days from the date of this judgment. The respondent a self-actor opposed the application but is not in attendance despite service of the notice of set down at his chosen address. Nonetheless, the court has decided to determine the matter on merits and the applicants' legal practitioner made submissions and urged the court to exercise its discretion and grant the order sought.

It will be noted that, applicants having received summons in the main matter, entered appearance to defend on 14 October 2016 and only filed the exception to the summons on 24 February 2017 after being served with a notice to plead.

The record shows that when the applicants received summons, they requested for further particulars, even after being furnished with further particulars, they asked for further and better

particulars. No plea was forthcoming in January 2017. They waited for a month, only to file an exception on being prompted by a notice to plead. In the founding affidavit the applicants submitted that the exception has unassailable prospects of success hence it is in the interest of justice that they not be made to go all the way to trial hence they seek the court to invoke the provisions of r 4C of the High Court Rules, 1971 and condone their failure to adhere to the rules. The court is of a different view. There is no proper explanation as regards why there was a delay and failure to comply with r 138 and further the matter was ready for argument early October 2017 and the applicants had it removed from the roll on 5 October 2017. It is now in court a year later, the date being 18 October 2018. The delays already occasioned by the applicant's failure to act on time are such that it is not just and proper that there be any further delays by condoning all the failures to comply with set rules, especially when the exception can still be heard at trial.

In fact, r 138 lays the procedure for filing special pleas and exceptions and it states that where an exception has been filed, the parties may consent within 10 days of filing of such an exception to have the matter set down for hearing in accordance with subrule 2 of r 223. Failing consent, either party still has a further four days to set the matter down for hearing in accordance with subrule 2 of r 223. Failing such consent, and such application, the party pleading, especially excepting shall within a period of four days plead over to the merits if it has not already done so and the special plea or exception shall not be set down for hearing before the trial. The reasons why these rules are set as they are, was to ensure that there is a speedy determination to any exception raised, failure of which, then the matter reverts to the trial action whereby the exception should not be set down before the hearing of trial. This means that the exception has to be heard at trial.

Already, the applicants have occasioned delays by failing to plead on time, not only that, or upon being called upon to plead, they had already wasted time by way of seeking further and better particulars. Whilst it is their right to seek further and better particulars, the very fact that after receiving the further and better particulars, no action was taken until a notice to plead was filed, shows that the applicants were indolent and lacked diligence in handling this matter. This conclusion is justified more particularly when the exception was filed out of time yet r 138 is clear as to how and what they were supposed to do after filing their notice of exception. In fact, the

applicants then should have pleaded over despite filing their exception because that is what the rules state should be done.

Given that the granting of condonation lies in the court's discretion which discretion must be exercised judiciously, the court finds that this is not a proper case where such indulgence should be granted in full. Whilst condonation for the late filing of the exception can be granted the court does not see any reason why the applicants should not be ordered to plead over to the merits rather than be given leave to set the exception down. This is moreso when r 139 (2) provides that a party who pleads over to the merits may be allowed the cost of such plea, even where the case has been disposed of without going into such merits. This in essence means that the applicant would not be prejudiced should they successfully argue the exception at trial and the exception is upheld. Suffice to note that the respondent who is plaintiff in the main matter has had to wait for movement of the main case since 24 February 2017 when the exception was filed. More than one year eight months later the applicants want to have the exception enrolled for argument. What they seek can still be achieved at trial stage and it is in the interest of justice that the matter progresses otherwise granting the applicants the indulgence will amount to trampling on the respondent's right to have his case determined within a reasonable period. The court thus finds it appropriate that the applicants pleads over and the matter goes for trial, certainly the first issue to be heard at trial would still be the exception. If they are successful at that stage and the matter is disposed of without going into the merits, the applicant can still be allowed to have their costs for filing of such a plea.

Accordingly the following order is granted

1. The late filing of applicants' exception be and is hereby condoned.
2. The applicant shall plead over to the merits within 10 days of the granting of the order.
3. The exception shall be heard and determined at trial.
4. Costs to be in the cause.

Dube, Manikai & Hwacha, applicants' legal practitioners