

JUDITH MALAME

Versus

NELSON ZHOU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 AND 2 AUGUST 2007

Ms M Dutiro, for applicant
L Chikwakwa, for the respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

“Terms of final order sought

1. That the respondent should deliver the Toyota Carina registration number AAQ 7050 to the applicant who should keep it in safe custody until case number HCB 2556/06 has been finalised.
2. That the respondent be interdicted from selling the Toyota Carina registration number AAQ 7050 to any other person other than applicant.

Interim relief granted

That the respondent should return to the applicant, a Toyota Carina registration number AAQ 7050 forthwith.”

The salient facts of the case are the following. In case number HC 2556/06 the respondent issued out summons against the applicant seeking the return of the above-mentioned motor vehicle. The applicant was served with the summons on 8 March 2007. The applicant entered a notice of appearance to defend on 19 March 2007. She, however, did not file her plea. On 11 April 2007 the respondent filed a notice of intention to bar. It was served on the applicant’s legal practitioners on 12 April 2007. On 19 April 2007 the day on which the notice of intention to bar expired, instead of filing her plea, the applicant filed a request for further particulars.

The papers do not show when this request was served on the respondent. The respondent was eventually barred resulting on the order granted against her on 28 June 2007. The respondent executed the order and obtained custody of vehicle through the Deputy Sheriff. The Deputy Sheriff took custody of the vehicle from the applicant on 12 July 2007 and handed it over to the respondent. Five (5) days thereafter, the applicant instituted this application simultaneously with an application

for rescission of the above-mentioned court order (HC 1616/07). It is the execution of the court order that prompted the applicant to spring into action. It is trite that neither further particulars nor the request for further particulars constitute a pleading in their own right - *IMF Management Services (Pvt) Ltd v Sicom Spar (Zimbabwe) Ltd* 1991 (1) ZLR 309 (SC). In this case GUBBAY CJ stated at 313H to 314B:

“Although there is no specific provision in the Rules, such as contained in Rule 21(2)(a) of the Uniform Rules [RSA], that once particulars are filed they form part of the pleadings, they undoubtedly do so. See *Nangle & Anor v Aronowitz* 1949 SR 47 at 51; 1949 (2) SA 713 (SR) at 717; and pre-dating the Uniform Rules, *Luttig v Jacobs* 1951 (4) SA 563 (O) at 566B; *MacDonald, Fareman & Co Ltd v Van Aswegan & Anor* 1963 (4) SA 735 (O) at 737A. I would emphasise, however, that recognition of this principle does not mean that particulars when furnished constitute a pleading. They merely serve to amplify the pleading they relate to. They become part of and additional to an extent pleading and do not exist as a pleading in their own right.”

Mr *Chikwakwa*, for the respondent, submitted that the facts of this case are on all fours with those in *Marley Floor Tile Co (SA) (Pty) Ltd v Geldenhuys* 1967(3) SA 585 (G.W.L.D.) and *Swart v Flugel* 1978 (3) SA 265 (E).

I do not agree with this submission. In the *Marley* case, at 588C-D, JACOBS J stated:

“The view which I have expressed above is apparently shared by the authors of Nathan, Barnett and Brink, *Uniform Rules of Court* on page 118, where the following appears:

“Where further particulars have been requested late ... it would appear that ... the plaintiff would be entitled to ignore the late request ... and to give notice of bar, on the expiration of the twenty-one days, under Rule 26.”

In a preceding paragraph, 588A-B, the learned Judge had held:

“Whatever the position may be in regard to an entry of appearance which is out of time I am of opinion that an irregular or improper request for particulars may be ignored by the party to whom it is delivered. This is stated in so many words in *Costa v Van Zyl & Anor* 1957 (4) SA 156(T) ...”

This case was also followed in the *Swart* case where it was held that a request for further particulars is not a pleading. It was also held that when a request for further particulars to a summons is out of time it is irregular and a plaintiff is entitled to ignore it and proceed to demand the defendant's plea and in default thereof to apply

for default judgment.

In this case, the request for further particulars was not filed out of time, as alluded to above, it was served on the applicant on 12 April 2007 and it was filed on 19 April 2007 i.e within the 5 day period in the notice. This principle would only apply if the request for particulars was filed on 20 April 2007 or thereafter. Clearly, the request was designed to stave off the default as it was filed on the eleventh hour.

Furthermore even the merits of the request for further particulars are questionable. Two of the four particulars have been sufficiently particularised in the plaintiff's declaration. In her application for rescission in HC 1616/07, the applicant herself, even before being furnished with further particulars, provided a copy of the written agreement between the parties. Everything that she is asking for is at her disposal from the written agreement and the plaintiff's declaration served with the summons. In her founding affidavit, in this application, she does not say that she

obtained the written agreement subsequent to her filing the request for particulars. This was never a *bona fide* request for further particulars. She was obviously not handicapped from filing her plea. If she was, she has not bothered to inform me how she was so handicapped. Litigants should not make requests for particulars simply to buy time. This procedure is designed to remove procedural prejudice or handicap to the party requesting particulars in its next procedural step. A party who abuses this procedural step of request for particulars which are clearly unnecessary does so on his/her peril. See *Russel Noach (Pvt) Ltd v Midsec North (Pvt) Ltd* 1999 (2) ZLR 8 (H). This is the case here. Based on such a request for particulars, this application has no leg to stand. Applicant failed to establish a clear or *prima facie* right and show an infringement of her right or at least a well grounded apprehension of such an infringement. She has not said why suing the respondent (in the event of success in HC 1616/07) is not a satisfactory remedy. On the balance of convenience, the vehicle has already been removed by the Deputy Sheriff from Zvishavane to Bulawayo and handed over to the respondent. A reversal of this execution of a court is not convenient in the circumstances – *Mabhodho Irrigation Group v Kadye & Ors* HB-8-03.

Accordingly, I dismiss the application with costs.

Dutiro & Partners, applicant's legal practitioners
Sansole & Senda, respondent's legal practitioners