

**JOSHUA MASENDA
SEBASTIAN DUBE
BETTER KWENGI
MARTIN MAMUTSE
RUEBEN MOYO
ANDREW MATSHAZI
BENJAMIN TSHUMA**

Versus

**N. STIPINOVICH (PVT) LTD
ROZANNA STIPINOVICH
NATASHA STIPINOVICH
PHILLIPE STIPINOVICH
SVRNAM (PVT) LTD
ANGELO JOSEPH STIPINOVICH
FRANCESCA ANN STIPINOVICH
THE ESTATE OF THE LATE JOSEPH STIPINOVICH
REGISTRAR OF DEEDS N.O.**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 23 JANUARY & 26 APRIL 2018

Special Plea

Mr J. Masenda in person
J. Tshuma for the defendants

MAKONESE J: This matter was set down for hearing on 23 January 2018 for oral argument on a special plea filed by the defendants, now applicants, in this matter. After hearing the parties I entered the following order:

- “1. The special plea is upheld
2. The plaintiffs’ claims be and are hereby dismissed with costs.”

I have been requested to furnish the reasons for judgment. I now set out my detailed reasons.

Background

The plaintiffs in this matter issued summons against the defendants claiming an order upholding an agreement of sale between the plaintiffs and Joseph Stipinovich and four others, concluded on the 4th March 2005, together with ancillary relief. On 24th April 2015, upon receipt of the summons the defendants' legal practitioners addressed a letter to the plaintiffs in the following terms:-

“We are instructed by 1st to 8th defendants in the above matter, as you will have seen from the notice of appearance to defend filed of record on the 8th April 2015 and served on you the same day.

Notwithstanding, that you as plaintiffs are self actors are nevertheless instructed and indeed are obliged, taking into account the manner in which you have pleaded to the claims in your declaration to except to substantial portions of your declaration as being, inter alia, argumentative, irrelevant and superfluous, evasive and vague and embarrassing and contain matters which may tend to prejudice, embarrass and delay the fair trial of this action.

The matter which defendants find to be excepiable on the grounds referred to are contained in paragraph 3, 4, 5, 6, 7, 8 and 9 of your declaration. We must ask you to amend your declaration so as to remove the cause of this complaint within 14 days of the service of this letter upon you.

Should you fail to act in terms of this request and amend your declaration to remove the causes of complaint, the defendants will file an exception and an application to strike out the portions of the paragraphs complained of and ask for costs against you.

This letter is written to you as a matter of urgency as self-actors and in terms of Rule 140 of the High Court Rules.

Yours faithfully

Webb low & Barry”

The plaintiffs filed a purported amended declaration which the defendants objected to on the basis that the summons was fatally defective in that at law only a legal practitioner was entitled to sue out a summons in the name of another person. Further, and in any event, the

defendants contended that the claims were prescribed. The declaration in both form and content was still vague and embarrassing and argumentative. For the sake of completeness, it is important to indicate that the basis of the plaintiffs' claims arise from an agreement entered into between Joseph Stipinovich and four others on the one hand and Joshua Masenda and three others. The agreement is headed "**Agreement of Association**".

The agreement provides as follows:

- "(a) The two parties hereby agree to be partners in the business of N. Stipinovich (Pvt) Ltd whereby workers will be entitled to 70% of income remitting 30% to the shareholders or directors listed above through the account number 2541014 Barclays Bank, Main Street, Bulawayo. This is so during the absence of the said directors.*
- (b) It also agreed (sic) that the workers are at any point entitled to the value of 70% value of the company, N. Stipinovich (Pvt) Ltd. This is to cover the workers' pensions and all terminal benefits which the company is not capable of paying.*
- (c) The workers will pay each other should one decide to resign or pay off to the deceased's family should a worker die it shall not be the responsibility of the directors ..."*

The agreement was signed on the 4th of March 2005. On 30th March 2005 A.J. Stipinovich a director of N. Stipinovich (Pvt) Ltd addressed a letter to the plaintiffs in the following terms:

"This letter is addressed to the ex-employees of N. Stipinovich (Pvt) Ltd who are currently using the company premises to operate the co-operative

Unfortunately, since the members of the co-op have not been able to maintain a viable operation and the company premises is being compromised, I hereby give you notice to vacate the premises as soon as possible and not later than 30th June 2015.

No further business is to be conducted on the premises by the co-op and no property or equipment belonging to the company is to be removed by the co-op.

Representatives of the major shareholders SVRNAM (Pty) Ltd, being Rozanna, Natasha and Phillipe will liaise with you with regard to your withdrawal.

Please note that the shareholders have taken a decision to dispose of the remaining assets at 69 Bon Accord and sell the premises.

The SVRNAM representatives have the mandate and approval of the other major shareholders, F. Stipinovich (Pvt) Ltd and A.J. Stipinovich to conduct the affairs mentioned above.

Yours faithfully

*A. J. Stipinovich
Director”*

This is the letter that triggered the issuance of summons by the plaintiffs. It is apparent that the initial agreement of the 4th of March 2005 was so loosely worded that it is difficult to understand the contractual rights and obligations of the parties under that agreement. The plaintiffs were obviously not deterred and filed the summons and declaration, which are now the subject of the special plea, which I upheld on 23 January 2018.

The issues

The defendants filed a special plea on two separate grounds. The first ground raised is that the first plaintiff could not act for and on behalf of the other plaintiffs as such conduct is prohibited under the Legal Practitioners Act (Chapter 27:07). The defendants contended that for that reason the summons was fatally defective. The second objection is that the claims were prescribed. The defendants' defence to the special plea is firstly, that the defendants were barred and therefore could not file the special plea. The defendants further averred that the first plaintiff was appointed by Resolution that gave him the requisite authority to act on behalf of the other individuals. Lastly, the plaintiffs claimed that the claims were not prescribed because the agreement was intended to be “permanent and did not amount to a “debt” as defined in the Prescription Act (Chapter 8:11)

I shall deal with each of the issues raised in turn.

Whether the defendants were barred

The record shows that on the 11th of June 2015 the plaintiffs caused to be served on the defendants' legal practitioners, a purported notice of intention to bar in terms of Rule 80 of the High Court Civil Rules, 1971. The rule provides as follows:

“Notice of Intention to Bar

A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in the rules and shall do so by delivering a notice in Form 9 at the address for service of the party in default.”

The above rule is peremptory in stating that the notice of intention to bar shall be in Form 9. The contents of Form No. 9 shall not be replicated in their entirety, however, there must be substantial compliance with the Form. The notice of intention to bar filed by the plaintiffs in this matter contained the first part of Form 9. It does not contain the requisite proof of service, nor does it contain the actual bar. The notice of intention to bar and bar is therefore fatally defective as the plaintiffs failed to comply with the requirements of Rule 80 of the Rules. Further, and in any event, the plaintiffs failed to comply with Rule 81 of the High Court Rules when attempting to effect the bar. Rule 81 relates to the actual method of barring and provides as follows:

“Procedure for barring

On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the Registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice to his attorney.”

Rule 81 makes it a procedural requirement that the endorsement on Form No. 9 shall be completed before filing. The plaintiffs did not include the endorsement on the notice of intention to bar and therefore this could not be completed as required by Rule 81. The bar was therefore not effected in terms of the Rules. A bar not effected in terms of the rules is incompetent and of no force and effect.

Further, and in any event, the purported barring by the plaintiffs was unprocedural in that the plaintiffs failed to provide any proof of service to indicate that the notice of intention to bar had been served. In the case of *Heating Elements Engineering (Pvt) Ltd & Ors v The Eastern and Southern African Trade & Development Bank (PTA Bank)* SC-13-02, SANDURA JA held that the failure to comply with the peremptory provisions of Rule 81 meant that no bar had been effected. He observed at page 3 of the cyclostyled judgment as follows:-

“Thus, the endorsement on the copy of the notice of intention to bar filed with the Registrar of the High Court in terms of Rule 81 was not duly completed and no certificate of service was filed with the Registrar as required in Rule 81. The provisions of Rule 81 were not therefore complied with. In the circumstances, the chamber application for a default judgment was not in order because the respondent did not comply with the barring procedure set out in Rule 81. The appellants were, therefore, not barred and the learned Judge President should not have granted the default judgment.”

In this matter, I am satisfied that the plaintiffs’ claim that the defendants are under bar is of no moment as the notice of intention to bar was fatally defective in that the procedural requirement for effecting a bar had not been complied with. The defendants were not barred.

Whether the first plaintiff’s representation of other plaintiffs was competent

The first plaintiff is a self actor. He sued out a summons for and on behalf of the other plaintiffs. The first plaintiff purported to rely on a Resolution of the other plaintiffs, and averred that he was granted authority to act on behalf of the other parties by such Resolution. The first plaintiff purported to rely on powers of attorney that were not part of the pleadings. In spite of these purported powers of attorney, the first plaintiff’s attempt to act on behalf of other persons in this matter contravenes section 9 (2) of the Legal Practitioners Act. Section 9 of the Act provides in part that:

“(2) Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him shall –

- (a) Sue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction in the name of any other person; ...”

It is common cause that first plaintiff is not a registered legal practitioner. The first plaintiff purported to sue out the summons in these proceedings in the name of the second to seventh plaintiffs and on their behalf. This he could not do. The first plaintiff's actions contravened the provisions of the Legal Practitioners Act, and as such, are therefore clearly a nullity. The summons and declaration are fatally defective in that regard and the pleadings are consequently incompetent. The first plaintiff refused or failed to remedy the defect in spite of being called upon to do so.

Whether the claims are prescribed

The agreement on which the plaintiffs rely in these proceedings was entered into on the 4th of March 2005. The plaintiffs contend that the agreement existed in perpetuity, and that for that reason, was not subject to the provisions of the Prescription Act (Chapter 8:11). The plaintiffs argued that the debt they are suing for is not a “debt” as defined in the Prescription Act.

As I have indicated earlier, the exact nature of the plaintiffs' claims is unclear from the agreement and the summons. The cause of action arose from the purported “**Agreement of Association**” entered into between the late Joseph Stipinovich. The plaintiffs' allege that a sum of US\$350 000 is due and owing to them in terms of the agreement. It is not clear from the provisions of the agreement how the defendants' indebtedness arose. The agreement provides that at any point the workers would be entitled to a 70% value of the company. It is not stipulated what the value of the company was. No such value was computed and clearly the agreement was worded in vague terms. The agreement was entered into on 4th march 2005. In terms of the Prescription Act, section 15 (d) an ordinary debt shall prescribe after 3 years. In terms of section 16 of the Act, Prescription begins to run as soon as the debt is due.

In order to determine when the debt was due, an examination of the wording of the agreement is necessary. The agreement stated that the workers were entitled at any point to 70% of the value of the company. As such, the debt became due on the date of signature of the agreement. The debt therefore prescribed 3 years after the date of signature of the agreement, on 5th March 2008. The plaintiffs' claims, if any, were therefore prescribed by operation of law.

Disposition

For the foregoing reasons, I have no doubt that the defendants have not been barred in this matter as the purported notice of intention to bar was fatally defective. The first plaintiff's purported representation of the other plaintiffs in the matter is prohibited under the Legal Practitioners Act. The plaintiffs' claims are clearly incompetent.

The proceedings filed in this matter are fatally defective and incurably bad. In any event, plaintiffs' claims if any, are wholly prescribed.

Accordingly after hearing oral arguments from the parties I entered the following order:

1. The special plea is upheld.
2. The plaintiffs' claims be and are hereby dismissed with costs.

Webb, Low & Barry, defendants' legal practitioners