

NONTOKOZO TACHIONA

Versus

BRIGHTON NDEBELE
and

ZIMBABWE UNION CONFERENCE OF THE
SEVENTH DAY ADVENTIST CHURCH
and

SOUTH ZIMBABWE CONFERENCE
OF THE SEVENTH DAY ADVENTIST CHURCH
and

BULAWAYO SEVENTH DAY ADVENTIST
CITY CENTRE CHURCH

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 29 JUNE 2018 AND 25 OCTOBER 2018

Opposed Application

Mazibuko for the plaintiff
Advocate T Mpofu for the 2nd, 3rd & 4th defendants

MAKONESE J: This judgment relates to two matters that have been consolidated. They relate to the same subject matter. Under case number HC 997/17 the plaintiff issued summons against the defendants for damages allegedly suffered by the plaintiff at the hands of the defendants. Plaintiff alleges that sometime in April 2016 first defendant sexually assaulted her. The plaintiff was deeply offended by first defendant's conduct and claims she suffered psychological stress, trauma, mental anguish and injury to her dignity. The plaintiff further avers that second to fourth defendants took no steps to investigate her report and failed to assist her

emotionally and spiritually. The second to fourth defendants filed an exception, application to strike out and a special plea in response to the claims. Under case number HC 554/18 an application for condonation for late filing of heads of argument was also filed by second to fourth defendants. The application for condonation is opposed.

This matter has generated immense attention in the local media. Several court proceedings arising from this case have been handled in the magistrates' court, and in this court as well. This will be the third judgment of this court related to this matter. The other judgments of this court are HB 63/17 and HB 187/17. I shall restrict myself to the issues before me for determination in this matter.

Condonation

The applicants in case number HC 554/18 contend that the application for condonation should never have been opposed. The facts of the matter are fairly simple. The respondent (plaintiff in the main action) brought a civil action against the applicants (3rd to 4th defendants in the main action) claiming certain delictual damages. The defendants took issue with the pleadings which they claim were badly pleaded. The defendants excepted to the action and filed a special plea and application to strike out parts of the declaration. Having filed the objections, defendants sought the plaintiff's co-operation in setting them down as is required by the rules. The plaintiff replied, drawing attention to the fact that the request was precipitous as there was a chance that she was not opposed to the objections. The plaintiff proceeded to oppose the application to strike out and special plea and forgot about the exception. This meant that the exception was unopposed and heads of argument in its sustenance were deemed unnecessary. When the plaintiff woke up to the need to file an opposition, defendants had at any rate filed heads of argument addressing the exception, application to strike out and special plea. She sought and was granted an indulgence. Resultantly, she filed opposition. Realising that the heads of argument in respect of the exception were out of time, and taking into account that the application was conceded, the plaintiff brought this application. I must point out that the rules of the court are generally meant for the just and effective resolution of disputes. No litigant has the right to employ rules of court in a manner that is disruptive of litigation. The rules are not an

end in themselves to be slavishly adhered to at the expense of the resolution of the real and genuine issues before the court. See the remarks in *Profert Zimbabwe (Pvt) Ltd v Macdom Investments (Pvt) Ltd* HB 83/16.

The substantive argument against the granting of condonation is that, in the light of the peremptory provisions of Order 4 rule 138 (c) as read with rule 238 (1) (a) of the rules of the High Court, the setting down before trial of a special plea, application to strike out as well as an exception after a defendant fails to file its heads of argument timeously in terms of the rules is expressly forbidden. It is argued that the purpose of the rule was to deal with or suppress the mischief of having a matter set down after defendant fails to file its heads of arguments timeously. Rule 138 provides as follows:

- “Where a special plea, exception or application to strike out has been filed-
- (a) the parties may consent within ten days of the filing of 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 subrule (2) of rule 223;
 - (c) failing such consent and such applicants the party pleading specially, excepting or applying that 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 date.”

The factors which this court should consider in an application for condonation are clearly set out in *Civil Practice of the Supreme Court of South Africa*, 4th Edition, by Van Winsen, Cilliers and Loots at page 897 and 898 as follows:

“Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from non-compliance, and the fact that the respondent has no objection, although irrelevant, is by no means an overriding consideration.

The court’s power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all facts and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will bring the best interests of justice. The factors usually weighed by the court in considering applications for condonation ---- include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent’s interest in the finality

of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice ---.”

In applying these principles to the factual basis of the matter, the degree of non-compliance is not inordinate at all. It is my view that the application for condonation is merited for the following reasons:

- (a) The exception by the defendants was not opposed until the 17th July 2017. By then the heads of argument had been filed and the Notice of Set Down sent to the Registrar.
- (b) The prospects of success of the special plea, exception and application to strike out are reasonable. The issues that have been raised are not frivolous and vexatious.
- (c) There is absolutely no prejudice to the plaintiff if the matter is dealt with on the merits. All pleadings have been filed for the purposes of special plea, exception and application to strike out.
- (d) The balance of convenience favours the matters being disposed of on the merits. Refusing to grant the condonation sought would not do justice to the case and the parties involved.

For these reasons the application for condonation is allowed.

The application to strike out

Rule 140 of the High Court Rules, 1971 reads as follows:

“Before-

- (a) *making a court application to strike out any portion of a pleading on any grounds; or*
- (b) *filing an exception to a pleading;*

The party complaining of any pleading may state by letter to the other party the nature of the complaint and call upon the other party to amend its pleading so as to remove the cause of complaint.”

The plaintiff avers that the rules contemplate the filing of a court application in making an application to strike out. It is argued that the application does not comply with the rules of court and must be dismissed with costs. Further plaintiff argues that there was no notice in terms of rule 140 (1) (b) of the High Court rules calling upon the plaintiff to remove the cause of

complaint. In the present matter, however, upon being served with the application to strike out, the plaintiff sought to remove the cause of complaint. The plaintiff filed an Amended Declaration, in which the complaints cited in the application to strike out were supposedly taken care of. It is clear that the application to strike out, though not in the normal form prescribed by the rules, has been conceded by the plaintiff. The paragraphs complained of have no place in a pleading. The declaration was simply telling a story and was not a declaration at all. The rules are clear as to what a pleading is. Rule 99(c) provides as follows:

“A pleading shall

- (c) contain a statement in summary form of material facts on which the party relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.”*

The plaintiff’s declaration was crafted in breach of rule 99 of the High Court Rules. The impugned paragraphs must therefore be stricken out. Rule 137 of the rules provides for the procedure of taking a plea in bar, exception and motion to strike out. The rule provides as follows:

- “(1) A party may—*
- (a) take a plea in bar or in abatement where the matter is of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;*
 - (b) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be,*
 - (c) apply to strike at any paragraphs of the pleading which should be properly struck out;*
 - (d) apply for a further and better statement of the nature of the claim or defence or for further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.*
- (2) A plea in a bar or abatement, exception, application to struck out or application for particulars shall be in the form of such part of Form 12 as may be appropriate mutatis mutandis, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed.”*

An application to strike out, just like an exception and special plea must be in Form 12. A court application to strike out is accordingly *sui generis*. I am therefore, not persuaded that the application to strike out does not comply with the rules. The rules mandate the use of Form 12.

In any event, it is open to this court to have recourse to rule 4(c). This permits a departure from any provision of the rules where the court or judge is satisfied that the departure is required in the interests of justice. See *Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at page 419.

The plaintiff prays that the application to strike out be dismissed with costs. In the same breath the plaintiff moves for the amendments to the declaration to be allowed with costs. This appears odd. The amendments referred to by the plaintiff were filed without the leave of the court. There was no consent from the defendants. The amendment purports to amend the entire declaration. The amendments filed by the plaintiff are not properly before the court. In *ZFC Ltd v Taylor* 1999 (1) ZLR 308 (H), the learned judge remarked thus: (page 310).

“Although the point does not arise in this case, a few remarks concerning the amendment of the claim would not be out of place. There is a practice prevalent, born of indolence and ignorance of the rules, whereby parties purport to effect an amendment of process and pleadings by the unilateral issue of a so-called “notice of amendment”. One frequently finds in applications for default judgments that such notices have been issued after the default or bar, as the case may be, and are not even served upon the defendant. This is entirely unprocedural.

There are only two possible methods of procuring an amendment to process or pleading after the issue of summons. One is by consent of the parties and the other by the order of this court.”

In effect therefore, the basis of the application to strike out relates to the original summons and declaration. The court must proceed on the basis that any amendment of the declaration must be in terms of an order of this court. The implications are clear. The application for an order to strike out the offending paragraphs must be allowed. The application to strike out must therefore succeed. The plaintiff may then effect their amendments in accordance with the rules of court. This seems to me to be the only plausible method of resolving the application to strike out.

The special plea

The defendants have taken the point, in the special plea, that 4th defendant has no legal personality. This point is taken on the grounds that the fourth defendant is a branch of the

Seventh Day Adventist Church. There is nothing further laid before the court in support of the special plea. The argument seems to be that because fourth defendant is a branch of the church it naturally has no legal personality. No reference is made to the church manual in support of the contention. The court is alive to the fact the onus rests upon the defendant who makes the assertion to prove it. It is my view, that in order for defendant's special plea to be determined evidence would have to be led in court. This court notes that the plaintiff is concerned that the hearing of the special plea before the trial would result in the duplication and elongation of proceedings. This may be so, but the court has a discretion on the matter. The court must in the end decide whether the special plea must be determined first, before the hearing. It is convenient to deal with the next objection to the plaintiff's summons before making a finding on the fate of the special plea.

The Exception

The plaintiff has indicated in her heads of argument that by some error, all copies of the exception, which was served simultaneously with the application to strike out, and the special plea, were retained by the person serving the "battery" of papers upon plaintiff's legal practitioners. The plaintiff consequently, attended to, and responded only to the special plea and application to strike out. An indulgence having been granted to the plaintiff by the defendant's legal practitioners, a response to the exception was duly filed. This court will exercise its discretion and make a finding that the failure to respond to the exception was not deliberate and accordingly deal with the merits of the exception. The first argument on which the exception is premised is that the conduct of first defendant complained of does not constitute a discharge of the functions of a Minister of Gospel.

It is settled law that an exception is to be decided strictly with reference to the pleading excepted to only. No evidence can be led, or additional facts alleged. What the exception does is to complain of an inherent defect in the pleading. The case of *Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (SC) is relevant to the determination of this exception. The appellant in that case provided a security guard to detect and prevent theft from the respondent's supermarket. The guard chosen for the task was dishonest and

participated in the theft of goods worth \$139539. The respondent sought to hold the appellant vicariously liable for the dishonest acts of his servant. It was held that unless the goods in question had been entrusted to the custody of the employee, the employer is not vicariously liable for any dishonest act of the employee. The court further held that a claim in delict can arise where it is alleged that a dishonest guard was employed in breach of the duty of care, or where there has been a failure to supervise the guard. In the present case, the basis of the plaintiff's claim is that first defendant whilst in the employment of the defendants made certain sexual advances including, hugging and caressing the plaintiff. It would appear that the defendant's objection is based both on a question of the law on vicarious liability, and fact as to the duty of care if any, the second to fourth defendants had towards the plaintiff. Those issues are eminently not suited for determination by way of exception. It occurs to me, that in cases involving sexual abuse, the courts may establish vicarious liability on the part of an employer where the acts of abuse, though not constituting a mode, even an improper one, of carrying out an employee's duty, may be sufficiently connected to the discharge of the employee's duties. This is clearly a matter to be dealt with by the leading of evidence. The issues raised in the special plea and exception should be dealt with at trial. In the result the exception is not merited and must be dismissed.

In the result, and for the foregoing reasons the court makes the following order;

1. The application for condonation in respect of the late filing of plaintiff's heads of argument is allowed.
2. The application to strike out is hereby granted.
3. The plaintiff is granted leave to amend the summons and declaration in terms of the rules.
4. The special plea and exception are hereby dismissed.
5. The defendants are ordered to plead over the merits in terms of the rules.
6. Costs in the cause.

Calderwood, Bryce Hendrie and Partners, plaintiff's legal practitioners
Coghlan and Welsh, 2nd, 3rd & 4th defendants' legal practitioners